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THE EVOLVING ESTABLISHMENT CLAUSE JURISPRUDENCE AND SCHOOL VOUCHERS

*Michael J. Frank**

Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools, and means of education shall forever be encouraged.¹

INTRODUCTION

The United States Supreme Court has long recognized that education plays a fundamental role in preserving the political, economic, and cultural structure of the United States.² That august body was certainly correct when it observed that a sound education is “the very foundation of good citizenship, . . . a principal instrument in awakening the child to cultural values.”³ It is necessary to “prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”⁴ These sentiments are in accordance with those of America’s founders, such as Thomas Jefferson, who believed that education was crucial to good citizenship and was society’s greatest defense against the advent of domestic tyranny.⁵ This wisdom has not been lost on this Nation’s contemporary leadership, which has recently reiterated that enhanced education is imperative to the ability to repel foreign invaders.⁶ In a related vein, it has been recognized that proficiency in education is essential to the

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1. The First Congress readopted the Northwest Ordinance passed initially by the Continental Congress in 1787. The quote is from the Third Article, which pertained to land for schools. First U.S. Congress, Third Article of the Northwest Ordinance, Continental Congress, 1787.

2. *Plyler v. Doe*, 457 U.S. 202, 203 (1982) (stating that education plays a “‘pivotal role’ in sustaining our political and cultural heritage.”).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Plyler*, 457 U.S. at 221 (stating “education has a fundamental role in maintaining the fabric of our society”).

4. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

5. Jefferson also wrote, “The basis of our governments being the opinion of the people, the very first object should be to keep that right.” Thomas Jefferson, *Letter to Edward Carrington*, Jan. 16, 1787, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 381 (Adrienne Koch & William Peden eds., 1944).

6. George F. Will, *The Need for National Testing*, in *THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS* 199 (1994) (stating that “[t]oday the principal threat to America is America’s public-education establishment.”).

Nation's economy, as it provides the means by which citizens lead economically productive lives to their own betterment and that of society.⁷ Not surprisingly, then, Americans "have always regarded education and [the] acquisition of knowledge as matters of supreme importance."⁸ In the high-tech economy of the new millennium, and in light of the technologically advanced weaponry that protects the United States, a sound educational system has become increasingly imperative to America's interests at home and abroad.

Religious schools, in particular, have risen to the occasion by effectively instructing students according to the principles and truths of the myriad disciplines that are indispensable to moral and economic success in the modern world. Whether on the primary, secondary, or tertiary level, these institutions dedicated to the transmission of knowledge have served America well.⁹ Their accomplishments have not gone unnoticed, as even the federal and State governments have perceived the special benefits that religious schools confer on the Nation,¹⁰ whether through the inculcation of moral values, or through outstanding instruction in the sciences and humanities. Even a frequently hostile Supreme Court was forced to concede that "non-public schools have played an important role in the development of American education" and the American Republic.¹¹ "Private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience."¹² Its "contribution has been and is enormous."¹³

7. *Plyler*, 457 U.S. at 221; *Yoder*, 406 U.S. at 221 (stating "education prepares individuals to be self-reliant and self-sufficient participants in society.").

8. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

9. Of course, there is nothing like failure to make even minor successes stand out. The vaunted success of religious schools may be due, in part, to the failures of public schools, whether in teaching morality or grammar. See, e.g., George F. Will, 1991: *Fate Wields a Blackjack*, in *THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS* 45 (1994) (noting that "A college-bound New York City student said he was glad the schools were distributing free condoms because 'I don't want to get no disease.' Schools give children condoms before, or instead of, grammar. First things first.").

10. *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985), *overruled in part by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971); *Bd. of Educ. v. Allen*, 392 U.S. 236, 247 (1968).

11. *Ball*, 473 U.S. at 397, *overruled in part by* *Agostini v. Felton*, 521 U.S. 203 (1997).

12. *Allen*, 392 U.S. at 247.

13. *Lemon*, 403 U.S. at 625. Even liberal commentators acknowledge that religious schools play an important role in American education, if for no other reason than that they provide a different perspective. See STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 250-51 (2000) (stating that Americans should "prize and preserve the tension between the shared civic values represented by public schools and the particular moral and religious values of families, churches, and other moral communities. No one source of authority should dominate the educational landscape."). Macedo admits that vouchers

Unfortunately for America, however, many parents cannot afford the benefits of a private school education. At the same time, society cannot ethically, economically, or militarily afford an undereducated citizenry.¹⁴ Yet this is exactly what some public schools systems are producing. Realizing the gravity of this situation, various State governments have attempted to assist underprivileged students by awarding education vouchers that enable the parents of these students to select a private school education for their children. In many locations, this might be the students' only chance to receive a sound education. For some, it also might be their only chance to escape the vicious cycle of poverty into which they were born and in which many will die, prematurely at that.¹⁵

Better-educated students mean better lives, better Americans, and a better America. But in many school districts, "better" is not even part of the vocabulary, especially where a plausible deficiency is now tolerated as the norm. A pitiful pedagogy permeates the very foundations of many monopolistic school districts even though the very existence of the American constitutional system of government is riding on society's ability to produce a well-educated citizenry.¹⁶ In light of this fundamental need for better education and the correlation between religious schools and academic excellence,¹⁷ it is surprising that

may be one means of ensuring diversity of opinion, although he objects to the funding of "pervasively sectarian" institutions. *See id.* at 270-71.

14. As Aristotle wrote, "The best laws, though sanctioned by every citizen of the state, will be of no avail unless the young are trained by habit and education in the spirit of the [C]onstitution." Aristotle, *Politics*, Book V, 9, 1310a12-18, in *THE BASIC WORKS OF ARISTOTLE* 1251 (Richard McKeon ed., 1941). Or as a more contemporary sage has put it: "Morality is an essential soil for free and democratic governments." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 142 (1996). Despite the fact that government is dependent upon public morality, it may not be the best producer of this morality. "Even though public morality is a public good, its maintenance depends far more on contributions of private institutions than on those of law and government." Robert P. George, *The Concept of Public Morality*, 45 AM. J. OF JURISP. 17, 19 (2000).

15. "They say that those who have riches enter hardly into the kingdom of Heaven. By Jove, they do; they are like Struldbrugs; they live and live and live and are happy for many a long year after they would have entered into the kingdom of Heaven if they had been poor." SAMUEL BUTLER, *THE WAY OF ALL FLESH* 335 (The New American Library, Inc., 1960); (1903). Because many of the students who would benefit from vouchers are underprivileged, it has not escaped notice that vouchers also serve a social justice function. *See generally* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, The First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301 (2000).

16. *See Mueller v. Allen*, 463 U.S. 388, 395 (1983) (stating, "An educated populace is essential to the political and economic health of any community . . .").

17. Milton Friedman relates one example of education excellence at a Catholic School in the Bronx, which is not otherwise known for its fine academic institutions.

One example at the elementary level is a parochial school, St. John Chrysostom's, that we visited in one of the poorest neighborhoods in New York City's Bronx. Its

the Constitution itself has been invoked by those who seek to deny government aid to those most in need of—and most unable to afford—a decent education.¹⁸

Starting only in the latter half of the twentieth century, the Supreme Court frequently used the Establishment Clause to invalidate programs that utilized government funds to assist religiously affiliated schools, even though these programs proved beneficial to both the students and the nation.¹⁹ The Court's shameful Establishment Clause track record may be attributable to the difficulty of interpreting the vague contours of the Religion Clauses,²⁰ the overzealousness of some justices for the eradication of imagined violations of the First Amendment,²¹ or even their hatred for a particular religion.²² Whatever the motivation behind this line of decisions, at least a por-

funds come in part from a voluntary charitable organization, New York's Inner City Scholarship Fund, in part from the Catholic Church, in part from fees. The youngsters at the school are there because their parents chose it. Almost all are from poor families, yet their parents are all paying at least some of the costs. The children are well behaved, eager to learn. The teachers are dedicated. The atmosphere is quiet and serene.

The cost per pupil is far less than in public schools even after account is taken of the free services of those teachers who are nuns. Yet on the average, the children are two grades ahead of their peers in public school. That's because teachers and parents are free to choose how the children shall be taught. Private money has replaced tax money.

Control has been taken away from the bureaucrats and put back where it belongs.

MILTON AND ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 159 (1980).

18. Besides providing underprivileged students with a better education than they might receive in a public school, vouchers result in greater liberty concerning school choice, encourage parental involvement in education, and create healthy competition with the public schools. See James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 620 (1994).

19. See, e.g., *Lemon*, 403 U.S. at 602; *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (direct aid to religious schools and reimbursement and tax relief for parents); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of equipment and instructional materials), *overruled in part by Mitchell v. Helms*, 530 U.S. 793 (2000); *Ball*, 473 U.S. at 373 (program providing remedial teachers to religious schools), *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997).

20. Many Justices have noted the interpretive difficulties that the Establishment Clause presents. *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986) (Marshall, J.) (stating, "The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application."); *Ball*, 473 U.S. at 385 (Brennan, J.) (stating that the "Establishment Clause jurisprudence is characterized by few absolutes . . ."), *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller*, 463 U.S. at 392 (Rehnquist, J.) (stating, "the Establishment Clause presents especially difficult questions of interpretation and application."); *Lemon*, 403 U.S. at 612 (Burger, C.J.) (stating, "The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment.").

21. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I, cl.1.

22. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion) (the doctrine of prohibiting aid to "pervasively sectarian" schools was "born of bigotry," as it was a code for banning aid to Roman Catholic institutions).

tion of the Supreme Court has recently seen the error of this approach and retreated from the untenable positions staked out by some of the Court's more activist members. Inching closer to an original understanding of the Establishment Clause,²³ the Court has upheld the reimbursement of funds used by parents to send their children to religious schools,²⁴ the use of state funds to purchase textbooks that

23. "For most of our nation's history, the Establishment Clause was understood to do no more than forbid the enactment of laws preferring one faith over another." Hon. James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J. OF L. & PUB. POL'Y 189, 194 (2000) (citing *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting)).

24. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). In *Everson*, a lengthy opinion written by Justice Black, the Court upheld the constitutionality of a New Jersey law providing for the transportation of students to both public and private schools. *Id.* Part of this money was for the payment of transportation of children to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. *Id.* at 3. Mr. Everson's main complaint was that the New Jersey program forced citizens to financially support the teaching of religious tenets to which they were opposed, in violation of the Establishment Clause. Justice Jackson phrased the relevant question: "Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" *Id.* at 21 (Jackson, J., dissenting).

In addressing this issue, Justice Black's majority opinion, despite holding for students, reads like an indictment of organized religion. Indeed, the opinion is cluttered with diatribes about the need to quarantine religion so that a reader might think the Court was addressing a clear and present danger from marauding missionaries, rather than grammar school students hoping to hitch a ride to school. The opinion also set forth broad principles of non-establishment, and then promptly disregarded them in its holding. For example, the Court stated, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18. It remarked that the Establishment Clause forbids "laws which aid one religion" or "aid all religions." *Id.* at 15. Similarly, the Court stated that no "tax in any amount, large or small, can be levied to support any religious activities or institutions . . ." *Id.* at 16. The Court obviously did not mean for its words to be taken literally, as it promptly admitted that New Jersey was using tax money to pay for the transportation of children to Catholic schools, which unquestionably aided the Catholic Church in disseminating its religious message. Yet Justice Black found nothing wrong with this assistance to religion, suggesting that when they were building the high and impregnable wall between church and state, the Framers installed large windows at regular intervals. Or, more likely, no such wall was ever intended or has ever truly existed.

The Court's holding in *Everson* probably rests on the neutrality of the program and the fact that any benefit to the dissemination of a religious message was secondary to the primary benefits to the State: fewer children get hurt in accidents while attempting to go to school; better attendance at school; and the inculcation of strong morals. The Court observed that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." *Id.* at 18. Here, there was complete neutrality: any student attending school in New Jersey was entitled to free transportation regardless of his religious beliefs. The record apparently showed that children of all denominations received free transportation. And although the record indicates that only Catholic school children obtained free transportation to religious schools, there is no indication that other religions would not have been treated similarly.

For purposes of the debate over the constitutionality of school vouchers, *Everson* is an important decision. For the anti-voucher side, the case provides some important dicta. Despite that, the case clearly demonstrates that government funding, which has the effect—but not the in-

are then loaned to religious schools,²⁵ special tax deductions for parents who pay tuition at private schools,²⁶ the funding of sign language

tent—of assisting one religion more than others, will not be held unconstitutional on that ground. Thus, even under *Everson*, New Jersey could also have provided direct financial assistance to parents who send their children to religious schools, so long as there was no discrimination against students or schools based on their religion and the funding serves some government purpose.

25. See *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). *Allen* involved a New York statute that required public school districts to purchase school textbooks and loan them, free of charge, to all students in grades seven through twelve, regardless of whether they attended public or private schools. 392 U.S. at 238. Several school districts objected to the law because it required that religious (i.e., Roman Catholic) schools also receive loaned textbooks, purportedly in violation of the Establishment Clause.

In upholding the statute, the Court attempted to show that the loaning of textbooks was just like the provision of free transportation to school upheld in *Everson*. Like the transportation, the government funds were being used to serve a legitimate state interest: the education of children. Similarly, the primary effect was the promotion of secular education. Furthermore, the benefits were neutrally distributed, regardless of the religious affiliation (or lack thereof) of the parents, students, or participating schools. As in *Everson*, it was also true that loaning of textbooks has the secondary effect of aiding religious educational institutions, as they could now spend money earmarked for textbooks on something else, including things indisputably religious. The presence of quality textbooks might also encourage some parents to send their children to religious schools when they otherwise might not have done so. Nevertheless, "that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." *Id.* at 244. Under *Everson* and *Allen*, then, where there is neutrality in application, the secondary effects of aid programs will not prove fatal.

Another important aspect of the *Allen* analysis is that the Court was willing to assume that state officials would not neglect their duty to ensure that only secular textbooks were loaned to the schools. *Id.* at 244. Similarly, the Court assumed that the school districts could do this without interfering with the religious schools. In later cases, the Court departed from this approach, refused to indulge in such presumptions, and indeed presumed that state actors and religious schools would act collusively to violate the constitution. See, e.g., *Ball*, 473 U.S. at 387 ("there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school"), *overruled in part* by *Agostini v. Felton*, 521 U.S. 203 (1997). Fortunately, the Court's more recent cases indicate that this Establishment Clause paranoia has been cured, or is at least not immediately manifesting itself.

26. *Mueller*, 463 U.S. at 388. *Mueller* involved a Minnesota income tax provision that allowed taxpayers to deduct certain expenses—such as those for tuition, textbooks, and transportation—incurred in providing an education for their children. See MINN. STAT. § 290.09(22) (1994). Finding the practice objectionable, several Minnesota taxpayers sued the Commissioner of the Minnesota Department of Revenue and several parents who took advantage of the provision. Although they claimed a violation of the Establishment Clause, both the district court and the Eighth Circuit rejected their claim.

In a five to four decision authored by Justice Rehnquist, the Court affirmed. Its decision carefully applied the *Lemon* analysis. First, the Court held that although there is no express statement of legislative purpose for the tax provision, the Court would presume a secular purpose when the face of the statute gives no indication otherwise. *Mueller*, at 394-95 n.5. As to the primary effect of the deduction, the Court reiterated that simply providing some collateral aid to religion does not offend the Establishment Clause. *Id.* at 393. In other words, an attenuated financial benefit to religion does not violate the Constitution.

The Court stressed the neutrality of the tax provision as a program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the

interpreters at sectarian schools,²⁷ and the use of federal funds to pay the college tuition of a handicapped student studying theology at a religiously-affiliated college.²⁸ Perhaps inspired by the inherent reasonableness of this approach to the Establishment Clause, other courts have recognized the constitutional legitimacy of voucher programs, whereby parents of grammar school students are provided funds by the local government to send their children to the school of their choice.²⁹ But the specter of religious intolerance still rears its ugly head from time to time, and so this incremental progression has occasionally faced setbacks.

Despite significant gains in restoring a workable Establishment Clause jurisprudence,³⁰ trial and appellate courts have continued to invalidate government programs that would assist private schools in the performance of their educational mission. For instance, in *Simmons-Harris v. Zelman*,³¹ the Sixth Circuit invalidated a program that distributed vouchers to underprivileged students who wanted to es-

Establishment Clause." *Id.* at 398-99. Here, the deduction was available to all parents, regardless of whether they attended a religious or secular school. The fact that the provision was used primarily by parents of children in religious schools did not negate the neutrality of the provision. As the Court observed,

We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Id. at 401. The key, then, was the freedom of choice, not the extent to which individual parents elected to exercise that freedom.

The purifying effect of private choice was an essential point in yet another respect. *Id.* at 399. Any benefit to religion was the result of private parental choice, and this parental exercise of individual judgment further erodes the state action that is necessary for a violation of the Establishment Clause. As the Court stated, "[B]y channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject." *Id.* at 399. Furthermore, where private choice is present, such programs cannot reasonably be perceived as government endorsement of a particular religion.

27. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (finding government funding of a sign-language interpreter for deaf student in sectarian school does not violate the Establishment Clause).

28. See *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (noting that direct tuition payments to sectarian college that student was attending under state program for aiding the blind does not violate the Establishment Clause).

29. See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

30. The Establishment Clause has been made binding on the States through the Due Process Clause of the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

31. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *petition for cert. granted*, 122 S. Ct. 23 (2001).

cape underperforming public schools and the cycle of poverty they perpetuate.³² In doing so, the Sixth Circuit rejected the evolution of the Establishment Clause jurisprudence, electing instead to restore judicial hostility to all things religious.³³ Because of the crisis in American education,³⁴ state and local governments need to experiment with new educational systems, such as privatization and parental choice. As government and religion join together to banish the evils of ignorance, cases similar to *Simmons-Harris* are likely to arise with greater frequency. Not surprisingly, then, the Supreme Court selected *Simmons-Harris* for its Spring 2002 docket to decide whether the Sixth Circuit's views comport with the restored Establishment Clause jurisprudence. In *Simmons-Harris*, the Court must decide not only whether Cleveland's voucher program is constitutional, but whether it will continue its progression toward an intelligible First Amendment jurisprudence.

This Article discusses the defects of the reasoning employed by courts such as the Sixth Circuit, and the ways in which it differs from the emerging Establishment Clause jurisprudence.³⁵ It examines the relevant details of the Cleveland voucher program and the Sixth Circuit's erroneous treatment of the Establishment Clause in its *Simmons-Harris* decision.³⁶ The case is then analyzed in terms of the principles recently announced by the Supreme Court as it has grappled with the Religion Clauses and the Court's inconsistent interpretations of those Clauses. In particular, this Article considers the *Mitchell v. Helms* plurality opinion, and Justice O'Connor's concurrence in that case.³⁷ This Article concludes that the *Simmons-Harris* decision cannot prevail against the reasoning of the developing Establishment Clause jurisprudence, and that the Cleveland program was a legitimate exercise of State power to address an issue of both local

32. *Brown*, 347 U.S. at 493 ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). Notably, the Court in *Brown* sought to address the problems associated with the deficient education that black children were receiving at racially segregated schools. Through its voucher program, Cleveland sought to address the problems associated with deficient education produced by socially segregated schools.

33. *Simmons-Harris*, 234 F.3d at 945, *petition for cert. granted*, 122 S. Ct. 23 (2001).

34. Among the problems are "poor performance by American students on a variety of international education tests; a decline in scores on most standardized tests; and a decline in student knowledge in crucial subjects such as English and physics." William J. BENNETT, *OUR CHILDREN AND OUR COUNTRY: IMPROVING AMERICA'S SCHOOLS AND AFFIRMING THE COMMON CULTURE* 222 (1988). Much has changed since Bennett first penned his book, but the consensus seems to be that the crisis in education has not passed.

35. See *infra* notes 199-292 and accompanying text.

36. See *infra* Section IV.

37. *Mitchell*, 530 U.S. at 833-36.

and national concern.³⁸ In light of this, it is almost a foregone conclusion that the Supreme Court will reverse the Sixth Circuit's decision when it finally addresses the case. This, in turn, should instill in the States the courage to experiment with school choice and perhaps other valuable alliances with mainstream religions.

II. THE ESTABLISHMENT CLAUSE AND GOVERNMENT AID TO RELIGIOUS SCHOOLS

Over the years, the United States Supreme Court has addressed many cases in which the federal government or the states attempted to assist private schools, the students who attend them, and the parents who frequently make substantial sacrifices to ensure that their children receive a sound education.³⁹ More often than not, the Court has found this aid, whether direct or indirect, to violate the Establishment Clause. But this hostility to governmental cooperation with religious institutions is a somewhat recent phenomenon. As a glance at cases from around the turn of the nineteenth century indicates, the Supreme Court's understanding of the Establishment Clause has radically changed over the years to the detriment of religion and society. For example, in the 1899 case of *Bradfield v. Roberts*, the Court held that government funding of hospitals operated by an order of Roman Catholic nuns did not violate the Establishment Clause, even though the Catholic Church exercised control over the hospital.⁴⁰ Thus, in

38. See *infra* notes 293-297 and accompanying text.

39. See, e.g., *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646 (1980); *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973).

40. *Bradfield v. Roberts*, 175 U.S. 291, 295 (1899). Although the case did not involve the funding of religious schools, *Bradfield* was one of the earliest Establishment Clause challenges to public funding of religious institutions. In *Bradfield*, the federal government contracted with Providence Hospital, which was run by an order of Roman Catholic nuns, to provide health care for the poor in Washington, D.C. *Id.* at 294. The Court of Appeals for the District of Columbia refused to enjoin the payment of the funds, and the Supreme Court unanimously affirmed in an opinion written by Justice Peckham. *Id.* at 295, 300. Consistent with the Framers' understanding of the First Amendment, the Court first expressed doubt that government funding of a religious organization constitutes an "establishment of a religion" that runs afoul of the Establishment Clause. *Id.* at 297. But for purposes of deciding the case, the Court assumed that such disbursements constituted some sort of "establishment." Even under this assumption, however, there was no violation of the Establishment Clause because the incorporated hospital did not constitute a religious organization for purposes of the First Amendment. This was true even though the hospital was owned, operated, and controlled by a Roman Catholic religious order of women, whose admitted purpose was to serve Christ. The Court found all of this to be immaterial:

The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or mem-

initial encounters, the Court found such cooperative ventures to be constitutionally innocuous. But in 1948, the Court radically altered the course of its Establishment Clause jurisprudence. In that year, the Supreme Court held in *McCorm v. Board of Education* that public schools may not permit part-time religious instruction on school premises as part of the school program.⁴¹ Because most religions can easily conduct religious education on their own premises, the *McCorm* opinion's immediate consequences were minimal. Its long-term effect—the banishment of religious morality from publicly-funded educational institutions—has been disastrous for the United States, whether measured by surges in illegal drug use, violent crime, unwed pregnancies, or school shootings.⁴² Through *McCorm* and similar

bers of any religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purposes and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.

Id. at 298. Under this original understanding of what constitutes a "sectarian" organization, the mere incidence of religion and government funding does not result in a constitutional cataclysm. Under this view, there is no Establishment Clause violation when government contracts with religious corporations to provide medical services—or even educational services—to the needy. Unfortunately, this original understanding of the Establishment Clause later became obscured by activist courts.

41. *McCorm v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding that a public school may not permit part-time religious instruction on its premises as a part of the school program, even if participation in that instruction is entirely voluntary and even if the instruction itself is conducted only by nonpublic school personnel). Compare *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding that the release of public school students for religious education off of public school property was constitutional). Prior to the 1940s, the Court had little occasion to interpret the Establishment Clause. See Mark E. Chopko, *Vouchers Can Be Constitutional*, 31 CONN. L. REV. 945, 945-46 (1999).

42. The *McCorm* opinion, of course, did not single-handedly foment all of these evils, and popular culture also bears some responsibility, especially for the school shootings, which by many accounts were influenced by media's glorification of violence (Incidentally, as if precluding the government from instructing students in virtue wasn't bad enough, another line of First Amendment decisions leaves the government powerless to regulate the media's bombardment of teenagers with the message that sex and violence, and sexual violence, are perfectly acceptable behaviors.) But *McCorm* and its progeny gave rise to a mandatory amorality in public schools, and made it financially difficult for parents to send their children to religious schools, where virtue is still sometimes inculcated.

By suggesting that mainstream religion, and morality based on mainstream religion, is unimportant and unworthy of instruction, these decisions created an ethical void quickly filled by vice. The effect of these decisions was perhaps best expressed in by a fictional account of a Columbine High School student corresponding with God. The exchange went something like

decisions, the Court has invaded yet another area traditionally left to the executive and legislative branches of state and local governments, which presumably are more familiar with the needs of the citizenry than is the Court.

More recently, however, at least four members of the Court—Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas—have attempted to bring the Supreme Court closer to its original understanding of the Establishment Clause, as expressed by the Court in *Bradfield*.⁴³ After spending the latter part of the twentieth century in the dark ages of Establishment Clause jurisprudence, these Justices are attempting to catalyze a Renaissance of religious collaboration with government,⁴⁴ perhaps recognizing that as allies, cooperatively marshaling their respective resources, both church and state have a better chance of defeating common enemies, such as crime, teenage pregnancy, drug use, deficient educational systems, and discrimination. These Justices have woven yet another thread through the complicated tapestry that is the Court's Establishment Clause jurisprudence.

Despite its complexity, there are some general themes and characteristics fairly ascribable to the Court's Establishment Clause decisions. First, many of the Establishment Clause cases, and almost all of those dealing with aid to religious institutions, involve Roman Catho-

this: "Dear God. Why didn't you prevent the Columbine High School shootings?" To which God replies: "I'm not allowed in the schools." Earl McCrae, *Enquiring Minds Want to Know*, OTTAWA SUN, Feb. 13, 2000, at 7. Adding insult to injury and taking pettiness to new depths, the Columbine School encouraged relatives of the slain students to post tiles with tributes to their loved ones in the school, but prohibited those that made reference to God or religious symbols, presumably out of fear of violating the Establishment Clause. Richard Roeper, *Columbine Gunshots are Reverberating Still*, CHICAGO SUN-TIMES, Nov. 4, 1999, at 11. Contrary to popular notions, the lesson to be learned from the Columbine tragedy may have more to do with the First Amendment than with the Second.

43. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 289 (1996) ("At the time [of the enactment of the Constitution], an establishment of religion was understood to be the preference by government of one or more religions over others."). As Justice Stewart wrote:

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. Each State was left free to go its own way and pursue its own policy with respect to religion.

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) (internal citation omitted). Other scholars argue that it is impossible to determine the original meaning of the Religion Clauses. Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1712 (2000) (noting that the Framers' intent is not clear and unambiguous).

44. See *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions").

lic institutions, usually grammar schools.⁴⁵ Because the Catholic Church has an extensive network of health care, social welfare, and educational institutions, it is not surprising that the government might find it expedient to collaborate with these institutions to promote the general welfare. As Justice Clarence Thomas has noted, America has been no stranger to anti-Catholic bigotry, and many of the cases challenging the constitutionality of aid to Catholic institutions were likely a product of vehement religious bigotry.⁴⁶ Those who objected to Catholicism found it repugnant that Catholic schools received even incidental benefits from the government, and when they could not prevail at the ballot box (e.g. the Blaine Amendment), they resorted to the last best hope for unpopular causes and ideas: the courts.⁴⁷

A second recognizable theme, related to the first, involves the parties who have initiated the Establishment Clause lawsuits. Usually the party complaining about government aid to religious schools is not a student who was denied comparable aid, nor a competing religious institution hoping to get a piece of the action. Rather, it is frequently an organization that has an axe to grind with religion in general or with Catholicism in particular.

45. See *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest*, 509 U.S. at 1; *Allen*, 392 U.S. at 236; *Everson*, 330 U.S. at 1.

46. *Mitchell*, 530 U.S. at 828-29; see also Douglas Laycock, *The Underlying Unite of Separation and Neutrality*, 46 EMORY L.J. 43, 57-58 (1997) (America's "anti-Catholic movement attracted the favorable attention of Justices Black, Frankfurter, Rutledge, and Burton, and the intellectual attitude so pervasive, many of the other justices and the elite lawyers who would later become justices were likely to have been exposed to it directly or indirectly."). Professor Berg has documented bigotry among several Justices:

Black referred to proponents of school aid as "powerful sectarian religious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion." Justice William Douglas, in later opinions, quoted a polemical anti-Catholic book approvingly and accused institutional churches (of whom the Catholic Church would be the epitome), of "feeding from the public trough" through charitable tax exemptions. Douglas' opinions were also laced with unfavorable images such as that of the Church "indoctrinating its creed." Justice Wiley Rutledge complained about the "aggressive" and "persistent" posture of the Church on school aid. Four Justices attended a Unitarian-sponsored rally in Washington, shortly after *Everson*, where speakers celebrated Thomas Jefferson's anti-clerical religious views and, in an obvious reference to Catholicism, criticized religions that exercised "autocratic ecclesiastical control over the mind and conscience of [their] individual members."

Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 129 (2001) (footnotes omitted)..

47. Invalidation of popularly-supported programs based on disagreement with Roman Catholic theology or morality is hardly a sound basis for constitutional jurisprudence. *Otis v. Parker*, 187 U.S. 606, 608-09 (1903) (Holmes, J.) ("While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all.").

A third identifiable characteristic pertains to the Court's use of the now infamous *Lemon* test,⁴⁸ which looks to the purpose of the government action, its effect, and whether it impermissibly entangles government with religion.⁴⁹ In analyzing the cases under the first prong, although it is sometimes difficult to ascertain legislative purpose, the

48. The *Lemon* test is infamous because "it has proved well nigh impossible to apply." STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 110 (1993).

49. *Lemon v. Kurtzman* is one of the more notable Establishment Clause cases decided by the Court. 403 U.S. at 602. It is the case in which the Court first articulated the now infamous "Lemon test." It also represents the beginning of an era in which the Court routinely struck down state programs that incidentally benefited taxpayers making use of religious institutions. *Lemon* is also notable for being one of the few cases that have involved direct disbursement of state funds to religiously affiliated schools. At issue was a Rhode Island statute that authorized government funds to supplement the salaries of private school teachers and a Pennsylvania statute that reimbursed private schools for teachers salaries, textbooks, and instructional materials. *Id.* at 606-08. As with most funding cases, these programs provided aid almost exclusively to Catholic schools and their teachers.

From the start, the Court made it clear that it intended to read the Establishment Clause expansively. It began with the premise that the Clause prohibits more than just government establishment of religion; to some extent, it also prohibits laws "that could lead to such establishment." *Id.* at 612. The Court did not offer guidance as to how imminent this danger of an establishment must be before a constitutional violation occurred, other than its now famous *Lemon* test. Under that test—which simply added a third prong to the purpose and effect test the Court customarily employed in Establishment Clause cases—to withstand constitutional scrutiny: (1) the law must have a secular purpose; (2) it must not have the primary effect of advancing or inhibiting religion; and (3) the law must not foster an "excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

Not surprisingly, the Court held that both programs failed this test. Applying the test, the Court easily found a legitimate purpose for the laws—enhancement of the quality of education—even though one of the other purposes of the laws must have been the aid of religious schools. *Id.* at 613. The Court's problem was with the excessive entanglement prong. *Id.* As to the Rhode Island program, the Court thought it relevant that the schools receiving aid were adjacent to a church, were closely tied to the religious mission of the Church, and had crucifixes on the classroom walls. *Id.* at 615-16. Based on these attributes, the Court deduced that religious schools have "substantial religious character," which "gives rise to the entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.* at 616. Ironically, the Court believed that the entanglement was exacerbated by the fact that the State, in an attempt to comply with the Establishment Clause jurisprudence, prohibited the teachers whose salaries were subsidized to teach courses in religion. *Id.* at 618. Because enforcement of this rule would require monitoring, the State might meddle in the school's affairs, which apparently respects the establishment of religion.

The Pennsylvania program fared no better under the entanglement prong. A significant problem, from the Court's perspective, was that Pennsylvania provided direct aid to the religious schools, as opposed to other programs through which the funds were distributed to students and parents. *Id.* at 621. Although the direct aid apparently posed no Establishment Clause problem in itself, the Court believed that such aid required greater oversight by the State to ensure that it was spent on non-religious items, thereby requiring significant entanglement of the state and a church-affiliated school. *Lemon*, 403 U.S. at 621. Interestingly, Pennsylvania had not yet adopted intrusive oversight procedures, and, thus, there was no excessive entanglement for the Court to condemn. Undeterred by this inconvenient detail, the Court presumed that intrusive

Court usually has no trouble finding a secular purpose for whatever aid the government provides to citizens through the religious institution. The purpose of the aid is frequently one that is particularly important to society, such as health care or education, and the Court has been wise enough not to second-guess the legislature on this point. Moreover, when a court wants to invalidate a program, it really is not necessary to use the purpose prong, as the other two prongs are much more pliable and lethal. Thus, when seeking to hold programs unconstitutional, the courts generally resort to the "primary effect" prong of the *Lemon* test.⁵⁰ In essence, the courts find that the primary effect of the governmental action is the provision of some benefit to some re-

practices would be adopted, even though there was "no basis for predicting that comprehensive measures of surveillance and controls" would ever be implemented. *Id.*

The final entangling feature isolated by the Court was the political activity the Court believed the aid would engender, as if political activity were an evil to be avoided. "In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity." *Id.* at 622. The Court failed to explain how political wrangling over government funding has somehow become constitutionally suspect activity under the Establishment Clause, particularly because other aspects of the First Amendment protect and, thereby, encourage political fights. The best the Court could come up with is the following: "The potential divisiveness of such conflict is a threat to the normal political process." *Id.* Is divisiveness a threat to America's two-party (i.e., divided) political system? If that is so, divisive "speech," such as flag burning, should also be suspect. Yet the passions engendered by flag burning do not factor into the Court's analysis of its constitutionality and certainly has not stopped the Court from protecting such "expressive conduct" under the First Amendment. See *Texas v. Johnson*, 491 U.S. 397 (1989).

Government funding of abortion is also divisive, but the fractures in the polity that it has wrought does not make it unconstitutional, even though it also leads to an entanglement of the government with religious protesters. The funding of some welfare programs is also controversial and divisive. That does not make state funding of such programs—whether religiously based or otherwise—a violation of the Constitution, even though the government funding spurs contentious debates between advocates and critics of the funding. See, e.g., *Bradfield*, 175 U.S. at 291 (some members of the public objected to the government funding of a religious hospital). America has succeeded in maintaining unity, despite divisiveness, because its citizens previously were united by core values whose gravitational force is superior to the various forces that have attempted to tear the nation apart. Justice Antonin Scalia, among others, derides those who accuse religion of creating the hobgoblin known as "divisiveness." See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 126 (2001) (Scalia, J., concurring) (noting that the Good News Club must have the liberty to recruit new members "even if, as Justice Stevens fears . . . its actions may prove (shudder!) divisive").

Unlike government by unelected judiciary, at least with the political process' advocates have the opportunity to persuade their fellow voters of the need to adopt their particular position, despite the fact that heated debates and "divisiveness" may arise. As Learned Hand said, "[C]ounting heads is not an ideal way to govern [but] at least it is better than breaking them." GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 433 (1994). In short, the Court's reliance on divisiveness as an excessive entanglement rationale is flawed. Not surprisingly, then, the Court has slowly minimized the emphasis placed on the entanglement analysis.

50. *Bowen v. Kendrick*, 487 U.S. 589, 634 (1988) (Blackmun, J., dissenting) ("As is often the case, it is the effect of the statute, rather than its purpose, that creates Establishment Clause problems . . .").

ligious denomination or a religiously affiliated institution.⁵¹ In doing so, the courts essentially disregard the benefits that the program provides the taxpayers and the citizenry, and instead they focus solely on the religious aspect of the participating religious institution. Also unmentioned is the gravity of the harm to be eradicated by the cooperative venture, such as illiteracy or immorality. Thus, even if the government involvement with religion was deemed utterly essential to the survival of the Nation, the *Lemon* test requires the courts to ignore this fact when performing their Establishment Clause analysis.

Recently, more of these cooperative ventures are surviving judicial scrutiny. When they do so, it is usually because they are facially neutral and are applied according to religion-neutral criteria: they offer aid to all institutions willing to participate in the program, regardless of religion or lack thereof, assuming that the would-be participants are qualified.⁵² Importantly, qualification is not based on the religious persuasion of the institution. Despite this reliance on neutrality, as Justice Byron White pointed out, "the line between state neutrality to religion and state support of religion is not easy to locate,"⁵³ at least for some members of the judiciary. So even neutrality is no guarantee that a program will survive the unpredictable sensibilities of activist judges.

Another characteristic of Establishment Clause decisions worth noting is that they are almost always close.⁵⁴ On the Court of Appeals level, this means a host of two to one decisions;⁵⁵ while in the

51. See, e.g., *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472, 479 (1972) (holding unconstitutional a state program that reimbursed nonpublic schools for the cost of preparing examinations and recordkeeping).

52. *Mitchell*, 530 U.S. at 809 (plurality opinion) (stating that "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion . . ."); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) ("[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."); *Ball*, 473 U.S. at 382 (noting the Establishment Clause requires "the government to maintain a course of neutrality among religions, and between religion and nonreligion."), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion) ("Neutrality is what is required."); *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) ("The government has an obligation of 'benevolent neutrality.'"); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244 (9th Cir. 1981) ("The Establishment Clause ensures government neutrality in matters of religion . . .").

53. *Allen*, 392 U.S. at 245-46.

54. Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1741 (2000) (stating, "The Supreme Court is presently split closely on almost all important issues of freedom of religion and separation of church and state.").

55. See, e.g., *Simmons-Harris*, 234 F.3d at 945, *petition for cert. granted*, 122 S. Ct. 23 (2001); *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992), *rev'd*, 509 U.S. 1 (1993).

Supreme Court, the vote is commonly five to four,⁵⁶ with liberal Justices—who usually are not opposed to peculiar readings of the Constitution in support of all other government programs—frequently finding a violation of the Establishment Clause.⁵⁷ The inability to obtain a clear consensus suggests both a jurisprudence that is in flux, and perhaps one that is without a solid foundation. Recently, however, beginning in the Reagan era, a series of cases has pushed judicial interpretation of the Establishment Clause into a new, more cogent direction. Although it is too soon to opine with any certainty, the Court might slowly be gaining a consensus for an enduring Establishment Clause jurisprudence.

III. THE EVOLVING ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *Bowen v. Kendrick*⁵⁸

In 1988, as Ronald Reagan was nearing the end of his second term, the Reagan Revolution's effect on the United States Supreme Court's First Amendment jurisprudence was finally being felt.⁵⁹ It was in this era that the Court decided *Bowen v. Kendrick*, a five to four decision, authored by Chief Justice Rehnquist.⁶⁰ *Bowen* involved a facial and "as applied" challenge to the federal Adolescent Family Life Act, which provided federal aid to organizations that worked to combat teenage pregnancy and sexual promiscuity, and which provided assis-

56. This has led one observer to comment: "The chief requirement for understanding the Supreme Court's interpretation of the Constitution is the ability to count to five." Richard John Neuhaus, *The Anatomy of a Controversy, in THE END OF DEMOCRACY? THE CELEBRATED FIRST THINGS DEBATED WITH ARGUMENTS PRO AND CON AND "THE ANATOMY OF A CONTROVERSEY"* 175, 244 (Mitchell S. Muncy ed., 1997).

57. The five to four decisions include the following: *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled*, *Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller v. Allen*, 463 U.S. 388 (1983); *Stone v. Graham*, 449 U.S. 39 (1981); *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646 (1980); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

58. *Bowen*, 487 U.S. at 589.

59. See generally, CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991). By 1988, Reagan had been able to appoint Justice William Rehnquist to the center chair, along with O'Connor, Scalia, and Kennedy as Associate Justices. The 5-4 victories usually joined these four justices with Justice White, a moderate appointee of President Kennedy. By the time Justice White retired, Justice Thomas replaced Justice Thurgood Marshall, and assumed White's place in the conservative majority. Sometimes, however, Justice O'Connor elects to go her separate way. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (majority opinion written by Chief Justice Rehnquist, joined by White, Scalia, Kennedy, and Thomas; dissent by Blackmun, joined by Stevens, O'Connor, and Souter).

60. The dissenters were Justices Brennan, Marshall, Blackmun, and Stevens.

tance to pregnant teens.⁶¹ Among the organizations the plaintiffs found objectionable were religious organizations, including a Roman Catholic order of nuns known as the Daughters of Charity⁶² and an organization known as the Catholic Family Services.⁶³ Applying the *Lemon* test, the district court held that the statute was unconstitutional both facially and as applied, as its direct and immediate effect was the advancement of religion and it necessarily entailed extensive entanglement of government and religion.⁶⁴

In analyzing the facial constitutionality of the program, the United States Supreme Court also applied the *Lemon* test, but, demonstrating how unpredictable the test is, the Court reached a completely different conclusion than did the district court. As in most applications of the test, the Court easily found that the program had an important secular purpose: the prevention of premarital sex, along with the pregnancy, disease, and poverty that often follow.⁶⁵ The Court also made explicit that the Act could not be invalidated under the purpose prong simply because the goals of the statute coincided with the tenets of particular religions.⁶⁶ Were that the case, much of the United States Code would fall prey to the Establishment Clause.

As in most Establishment Clause cases, the parties grappled over the primary effect of the statute.⁶⁷ Under this second prong of the *Lemon* test, it was argued that the Act impermissibly elicits the involvement of religious organizations, endorses religious solutions, and funds religious groups, including "pervasively sectarian" organizations, whatever that means.⁶⁸ As to the involvement of religious organizations, the Court reiterated that the Establishment Clause does not prohibit the government from working with religion to eradicate secular problems.⁶⁹ Decisions about whether religion might assist the government are to be left to the legislature and executive branch, not the

61. *Bowen*, 487 U.S. at 593.

62. *Bowen v. Kendrick*, 657 F. Supp. 1547, 1565 n.16 (D.D.C. 1987).

63. *Id.*

64. *Bowen*, 657 F. Supp. at 1563, 1570.

65. *Bowen*, 487 U.S. at 602.

66. *Id.* at 604 n.8 (stating, "We also see no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations.").

67. *Id.* at 604 (stating, "As usual in Establishment Clause cases, . . . the more difficult question is whether the primary effect of the challenged statute is permissible.").

68. *Id.* at 606.

69. *Id.* at 609 (stating that "We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.").

courts.⁷⁰ Congress determined that religious institutions might prove useful in instilling family values essential to stem the tide of evils that result from adolescent premarital sex.⁷¹ Although this government program may have the effect of promoting religion, this effect is a secondary one,⁷² and thus not prohibited by the Establishment Clause.

The Court also addressed the argument that the funding of religious institutions necessarily had the primary effect of advancing religion. Chief Justice Rehnquist first noted that religious organizations have never been barred from receiving federal funds simply because they are religious, despite ubiquitous rhetoric about the great wall that separates church and state.⁷³ The Establishment Clause has never been

70. *Bowen*, 487 U.S. at 607.

71. *Id.* at 606-07 (stating, "these provisions of the statute reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the AFLA is addressed.").

72. *Id.* at 607 (stating, "To the extent that this congressional recognition has any effect of advancing religion, the effect is at most 'incidental and remote.'").

73. *Id.* at 609 (stating, "[T]his Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."). See also *Quick Bear v. Leupp*, 210 U.S. 50 (1908), which involved government financial support of the Catholic Indian Missions, which operated schools on Indian reservations. The government paid the missionaries who also taught religion to the Indians with tax dollars from the Sioux Trust Fund, which was created pursuant to a treaty with the Sioux Indians in exchange for land. Reuben Quick Bear, a Sioux Indian, sought to enjoin the payment of the missionaries because in 1897, Congress enacted a statute prohibiting the payment of government funds to "sectarian schools" as defined in the Act. *Id.* at 54. Notably, Quick Bear did not represent all Indians, as many of them sought education at the missions and the better life that formal education might entail. *Id.*

The Court held that the Commissioner of Indian Affairs could continue to fund the religious schools despite the Establishment Clause and the statutes prohibiting government funding of religious missions to the Indians. As to the statutory prohibitions, the Court held that these applied only to general government funds, and not the government funds previously placed in trust for the Indians. *Id.* at 77. These trust funds, because they belonged to the Indians, could be used as the Indians saw fit. *Id.* at 81. Because many of them sought education at religious schools, the Court held that they should not be denied the opportunity to have the Commissioner expend their funds for that purpose.

As to the Establishment Clause, Quick Bear did not waste his time even attempting to argue that payment to the religious schools violated this provision. *Id.* at 81. The Court noted that such contention would have been futile in light of *Bradfield*. But equally futile was the argument, which the plaintiff did make, that the "spirit of the Constitution" requires that such funding be prohibited "on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others . . ." *Id.* at 81. Although the Court did not reject this argument as constitutionally erroneous—instead it held that no such principles govern the Indians in their use of their own funds—the Court obviously was not much enamored with it.

This case contains a few points relevant to government funding of school vouchers. First, the *Quick Bear* Court saw nothing unconstitutional about the government providing funds to religious missionaries, even though the inculcation of religion was the focus of their mission. The Court noted that the government had funded Catholic missions to the Indians since at least 1819.

understood to be that restrictive. “[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.”⁷⁴ They are entitled to compete with secular institutions for federal funds without violating the Establishment Clause, so long as one religion is not preferred over another. That is, the government must be neutral among religions—not favoring, say, Lutherans over Catholics. When religious organizations receive funding, then, the relevant question will always be whether other similarly situated groups were *intentionally excluded* from receiving funds.⁷⁵ If not, there is no violation of

Quick Bear, 210 U.S. at 56 n.1 (quoting defendant’s Answer, ¶ 12). “From the history of appropriations of public moneys for education of Indians . . . it appears that before 1895 the government, for a number of years, had made contracts for sectarian schools for the education of the Indians, and the money due on these contracts was paid . . . from the ‘Tribal Funds’ and from the gratuitous public appropriations.” *Id.* at 78.

It is also apparent that in the 1890s Congress (or at least a majority of Congressmen) never believed that the Establishment Clause prohibited the funding of religious schools, as its enactment of the statute at issue in *Quick Bear* had this very effect. This suggests that the discriminatory interpretation of the Establishment Clause and the extent of its prohibition is a relatively recent phenomenon, which as of 1908 had not yet reared its ugly head. More importantly, *Quick Bear* stands for the proposition that tax dollars may be used to fund religious schools without violating the First Amendment. As with most issues, if the citizenry is opposed to the funding of religious schools—as some people apparently were in the 1890s—their remedy is through legislation, not constitutional litigation. “The Constitution does not resolve all difficult social questions, but leaves the vast majority of them to resolution by debate and the democratic process . . .” *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1296 (2001) (Scalia, J., dissenting); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 173 (1996) (“The Constitution” leaves “most subjects to the judgment and moral sense of the American people and their elected representatives.”). If the Establishment Clause did not bar the Indians from being able to send their children to a religious school of their choice, it likewise should not be held to bar anyone else from doing the same.

74. *Bowen*, 487 U.S. at 608 (quoting *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 746 (1976)).

75. Of course, it is often difficult to discern a legislature’s motives for enacting a statute, even when certain legislators offer their own personal motives for supporting a particular provision. “A legislature is not a single mind, and the determination of collective intent is often problematic . . .” RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 251 (1988). For starters, “[l]egislation is frequently the product of compromises that are not readily apparent to the judiciary.” *Aubert v. Am. Gen. Fin.*, 137 F.3d 976, 979 (7th Cir. 1998). One legislator’s reasons for supporting a statute might not be the same as another’s motives. Judge Easterbrook has opined:

Intent is empty. Peer inside the heads of legislators and you find a hodgepodge. Some strive to serve the public interest, but they disagree about where that lies. Some strive for re-election, catering to the interest groups and contributors. Most do a little of each. An inside some heads you would find only fantasies challenging the disciples of Sigmund Freud. Intent is elusive for a natural person, fictive for a collective body. The different strands produce quite a playground—they give judges discretion, but no ‘meaning’ that can be imputed to the legislature.

Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1993) (footnote omitted). Finally, Lon Fuller stated:

We tend to think of intention as a phenomenon of individual psychology, though what we are interpreting is a corporate act. Thus we ask after the intention of ‘the legislator,’

the Establishment Clause. To use the lingo of employment discrimination law to establish a violation of the Establishment Clause, there must be disparate treatment in awarding the government funds.⁷⁶ In making this disparate treatment analysis, the Court must first look at the face of the statute,⁷⁷ and then it must consider the actual distribution of funds.⁷⁸ But a mere disparate impact—where one group coincidentally but unintentionally receives a greater quality or quantity of government aid—is not sufficient to state a claim under the Establishment Clause.⁷⁹ The only way to protect against such an outcome is for governments to intentionally discriminate against religion, which would violate the Free Exercise Clause. As with other constitutional provisions, like the Cruel and Unusual Punishment Clause of the

though we know that there is no such being. At other times we speak of the intention of 'the legislature,' though we know that those who voted for a statute often do so with a variety of views as to its meaning and often with no real understanding of its terms. Moving closer to individual psychology we may speak of the intention of 'the draftsmen.' But again we are in trouble. There may be a number of draftsmen, acting at different times and without any common understanding as to the exact purpose sought. Furthermore, any private and uncommunicated intention of the draftsmen of a statute is properly regarded as legally irrelevant to its proper interpretation.

LON FULLER, *THE MORALITY OF LAW* 86 (1964) (footnote omitted).

76. "Disparate treatment 'occurs when a plaintiff is intentionally treated less favorably than others simply because of his race, color, religion, sex or national origin.'" *Bragg v. Navistar Int'l Transp. Co.*, 164 F.3d 373, 376 (7th Cir. 1998). Under a disparate treatment theory, there is no violation of the law absent an intent to discriminate. *AFSCME v. State of Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985) (Kennedy, J.). In a disparate treatment case, a plaintiff must do more than show that the employer was aware of adverse consequences a particular group would suffer. "The plaintiff must show that the employer chose the particular policy because of its effect on members of a protected class." *Id.* at 1405. The other side of the coin is that showing a disparate impact is not enough. Thus, a government program that results in ninety percent of the funds going to Lutheran organizations does not violate the Establishment Clause unless it is shown that the government *intentionally* excluded other religions, including the religion known as "non-religion."

77. For example, a statute would violate the Establishment Clause on its face if it said that only Unitarian Universalists could participate.

78. For instance, there could be an "as applied" violation of the Establishment Clause if it was shown that a government official intentionally excluded a certain religion from participating in the program. In *Hunt v. McNair*, the plaintiffs brought an "as applied" challenge to a South Carolina statute that provided for the issuance of revenue bonds for the construction of new schools. 413 U.S. 734 (1973). They conceded that the statute itself was constitutional, but argued that it violated the Establishment Clause to the extent that bonds were issued to fund the construction of religiously-affiliated schools. *Id.*

79. "Disparate impact claims, recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), do not require proof of intent to discriminate. Instead, they focus on facially neutral employment practices that create such statistical disparities disadvantaging members of a protected group they are 'functionally equivalent to intentional discrimination.'" *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000) (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988)).

Eighth Amendment⁸⁰ and the Equal Protection Clause of the Fourteenth Amendment,⁸¹ only intentional violations of the Establishment Clause are actionable. Here, however, the Court held that the statute was facially neutral, in the sense that “the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution,”⁸² and any claim that certain religions were intentionally preferred over others was undeveloped. As later cases demonstrate, facial neutrality will often be the key to a program’s constitutionality, as it was here.

Continuing the analysis under the “primary effect” prong, the Court addressed the plaintiffs’ argument that the program must be invalidated because a substantial number of the participants were “pervasively sectarian” institutions. In previous cases, this label had been the death knell for government aid programs,⁸³ based on the rationale that there is a greater danger that government funds will be used to advance the religious mission of pervasively sectarian institutions, as opposed to institutions that were just somewhat sectarian.⁸⁴ Consistent with its previous decisions, the Court mentioned that government aid could have the effect of advancing religion if it were given to an institution that is “pervasively sectarian.”⁸⁵

Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are “pervasively sectarian.”⁸⁶

The Court ambiguously defined a “pervasively sectarian” institution as “an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.”⁸⁷ Under this definition, many religious institutions—from social service agencies, to poverty relief organizations, hospitals, and universities—

80. The Eighth Amendment only proscribes the “wanton infliction of pain” by prison officials or deliberate indifference to medical needs. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

81. The “equal protection clause is violated only by intentional discrimination.” *Am. Nurses’ Ass’n v. State of Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

82. *Bowen*, 487 U.S. at 609.

83. *See, eg., Ball*, 473 U.S. at 385.

84. “‘Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission’” *Bowen*, 487 U.S. at 610 (quoting *Hunt*, 413 U.S. at 743).

85. *Id.*

86. *Id.* at 609-10.

87. *Id.* at 610 (quoting *Hunt*, 413 U.S. at 743).

qualify as “pervasively sectarian.” Other than noting that the programs at issue in previous decisions like *Aguilar v. Felton* and *Grand Rapids v. Ball*, which involved pervasively sectarian grammar schools,⁸⁸ no examples were given. So it is hard to say when an institution is “pervasively sectarian,” especially because *Aguilar* and *Ball* were subsequently overruled by the Court.⁸⁹ Of course, the reasoning behind the “pervasively sectarian” analysis is flawed, but rather than explicitly stating this, the *Bowen* Court held that such dangers did not exist here because only about a quarter of the participating institutions were pervasively sectarian,⁹⁰ in contrast to, say, *Grand Rapids v. Ball*,⁹¹ where almost all of the challenged aid flowed to parochial

88. *Aguilar v. Felton*, 473 U.S. 402, 411 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997). *Aguilar v. Felton* was a companion case to *Ball*. Just as in *Ball*, the Court’s opinion was written by Justice Brennan, and as with *Ball*, the Court held that the program violated the Establishment Clause. At issue in *Aguilar* was a New York program that used federal funds to send public school teacher into private schools to offer remedial courses. Recognizing that education is often the only legal way out of poverty, the New York program offered special educational services to children that were educationally deprived and who lived in poverty-stricken areas. Eighty-four percent of the private school students eligible to participate in the program attended Roman Catholic schools, which also taught religious subjects, but of course not with government money or instructors. *Id.* at 406.

Although the New York program was similar to the ones at issue in *Ball*, it differed in one material respect: in an effort to ensure compliance with the Establishment Clause, the school district adopted a system of monitoring to ensure that no religious content entered the programs. *Id.* at 409. *Ball* demonstrates that the failure to implement a strict monitoring scheme to prevent the inculcation of religion will result in the Court presuming that religion will be taught, or at least promoted, and on that basis finding the program unconstitutional. *Aguilar*, on the other hand, demonstrates that implementing Establishment Clause safeguards will simply result in the Court finding another ground to invalidate the program, namely, that monitoring entangles government and religious schools. *Id.*

As explained by the Court, the “excessive entanglement” prong of *Lemon* is rooted in concerns about the ultimate no-win situation. By having public and religious employees coordinate teaching schedules and monitor teachers (1) the freedom of religious belief of those who don’t adhere to the entangled religion “suffers” and (2) adherents to the entangled religion lose by having their freedom of religion “limited” by the entanglement. *Id.* at 409-10. Because the schools were “pervasively sectarian,” the cooperation of state employees and private school employees would somehow start a cataclysmic reaction that would result in the wholesale destruction of religious freedom. Luckily, the Court stepped in and this disaster was averted. Of course, the Court did not explain exactly how this disaster would have occurred or how it knew that such a disaster would strike. As in *School District of Grand Rapids v. Ball*, a record addressing these points apparently is not necessary. Of course, *Aguilar* is also like *Ball* in that the Court’s reasoning is unintelligible, which probably contributed to the Court’s subsequent decision to abandon it in *Agostini v. Felton*. Miraculously, *Agostini* has not yet resulted in the constitutional tragedy predicted by Justice Brennan.

89. See *Agostini*, 521 U.S. at 203.

90. *Bowen*, 487 U.S. at 610 (stating that “In this lawsuit, nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to ‘pervasively sectarian’ institutions.”).

91. *Ball*, 473 U.S. at 373.

schools.⁹² Later, in *Mitchell v. Helms*, Chief Justice Rehnquist joined the plurality that recognized the defective reasoning behind the “pervasively sectarian” distinction,⁹³ but in 1988, the Court was not yet ready to explicitly acknowledge this.

Importantly, the *Bowen* Court also departed from previous cases by holding that it would not presume that pervasively sectarian institutions will use government funds to proselytize.⁹⁴ In effect, the Court held that the burden of proving proselytization rests on the parties asserting it, and that they would enjoy no presumption of unconstitutionality. The Court made clear that no facial challenge will lie where the only harm is that pervasively sectarian institutions *might* receive some of the government money.⁹⁵

As to the third prong of *Lemon*, whether there is an excessive entanglement with religion, the Court noted that the disbursement of government money would almost always entail some government monitoring, and thus some “entanglement” with religion.⁹⁶ To the Court, at least, this monitoring was not a particularly extensive entanglement and certainly not enough to warrant invalidation of the program.⁹⁷ If religious institutions are to be as free as secular groups to compete for government funds, there must be some government oversight that does not violate the Establishment Clause, and the Court thought that the Secretary of Health and Human Services had achieved a reasonable balance of religious freedom and government supervision. The alternative would be to exclude all religiously affiliated organizations, which would undoubtedly violate the Free Exercise clause.

Because the Court found that the statute survived a facial challenge under all three prongs of the *Lemon* Test, it reversed the district court on its finding of facial unconstitutionality. As to the as applied challenge, the Court found that the record could not support the district

92. *Bowen*, 487 U.S. at 610-11.

93. *Mitchell*, 530 U.S. at 828.

94. *Bowen*, 487 U.S. at 612 (stating that “nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner.”).

95. *Id.*

96. *Bowen*, 487 U.S. at 615 (stating that “[t]here is no doubt that the monitoring of AFLA grants is necessary if the Secretary is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause. Accordingly, this litigation presents us with yet another ‘Catch-22’ argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid”).

97. *Id.* at 616 (noting that there is no reason “to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees.”).

court's holding, so it reversed and remanded that portion of the district court's opinion with guidance as to how the district court should proceed. Although the Rehnquist-led Court made great strides towards a workable Establishment Clause jurisprudence, it was still handicapped by its reliance on the *Lemon* test, and its failure to explicitly renounce the idea that "pervasively sectarian" organizations were constitutionally suspect.

*B. Zobrest v. Catalina Foothills School District*⁹⁸

In 1993, the Rehnquist Court continued its rehabilitation of the Religion Clauses in *Zobrest v. Catalina Foothills School District*. *Zobrest* differs from the usual Establishment Clause cases in that the government is the party asserting the Establishment Clause *as a defense* for its discrimination against religion.⁹⁹ James Zobrest was a student at a Catholic high school who required the assistance of a sign language interpreter.¹⁰⁰ When the Catalina Foothills School District refused to provide one, Zobrest's parents sued under the Individuals with Disabilities Education Act (IDEA) and the Free Exercise Clause.¹⁰¹ The School District defended its decision by claiming that assigning an interpreter to a Catholic school, where he would be required to translate the contents of both secular and religious classes, would violate the Establishment Clause because it would impermissibly aid religion and entangle religion and the state.¹⁰² Both the district court and the Ninth Circuit accepted these arguments and held that the school district acted properly in refusing assistance to the Zobrest family,¹⁰³ even though the Zobrest family would have received state assistance if James had attended a private school not affiliated with the Catholic Church or some other religion.

98. *Zobrest*, 509 U.S. at 1.

99. In most other Establishment Clause cases, the plaintiffs assert the Establishment Clause to attack government action. See, e.g., *Aguilar*, 473 U.S. at 411, *overruled in* *Agostini v. Felton*, 521 U.S. 203 (1997). But *Zobrest* is certainly not the only defensive use of the Establishment Clause by various government entities hoping to protect their discriminatory practices. See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (Establishment Clause was no defense to viewpoint discrimination); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 598 U.S. 384, 394-95 (1993) (holding that school district could not discriminate against local church group that wanted to use school property and that the Establishment Clause was no defense, as the Establishment Clause does not require discrimination against religion).

100. *Zobrest*, 509 U.S. at 3.

101. 20 U.S.C. § 1400 (1994).

102. *Zobrest*, 509 U.S. at 4.

103. *Id.* at 5.

In another five to four opinion penned by Chief Justice Rehnquist, the United States Supreme Court reversed.¹⁰⁴ In doing so, the *Lemon* test was noticeably absent,¹⁰⁵ except where the Court mentioned that the district court found an impermissible entanglement, while a divided panel of the Ninth Circuit focused on the primary effect of allowing an interpreter in a Catholic school.¹⁰⁶ The absence of the *Lemon* test is quite remarkable when one considers the “entanglement” of government and religion that the *Zobrest* family was requesting, which was a substantial entanglement by the Court’s previous standards. Long criticized,¹⁰⁷ the Court would later state in *Agostini v. Felton*¹⁰⁸ and *Mitchell v. Helms*¹⁰⁹ that excessive entangle-

104. *Id.* at 3, 14.

105. This case, along with several others, led to speculation in the academic community that the *Lemon* test was dead. Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1723 (2000) (stating that “[T]he Court has implicitly abandoned the *Lemon* test for the validity of enactments under the Establishment Clause, and has instead adopted an approach championed by Justice Sandra Day O’Connor—the ‘endorsement’ test.”) (footnote omitted). The federal courts of appeals, however, continue to utilize the test. See, e.g., *Am. Family Ass’n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1117 (9th Cir. 2002); *Indiana Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 770 (7th Cir. 2001). Justice Scalia has put forth a compelling explanation for the Court’s sporadic use, and later abandonment, of the *Lemon* test:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish to do so, but we cannot command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling the three prongs “no more than helpful signposts.” Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (citations omitted). See also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 113 (1993) (the Justices “simply ignored the rules of *Lemon v. Kurtzman* when applying them might prove too disruptive”).

106. *Zobrest*, 509 U.S. at 5.

107. Justice White, among others, often questioned the wisdom and origin of the “excessive entanglement” prong of *Lemon*. *Roemer v. Bd. of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring) (stating, “I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical, and as the Court had conceded from the outset, a ‘blurred, indistinct, and variable barrier.’”) (internal citations omitted). Despite its apocryphal foundation, the danger of creating an impermissible entanglement was the centerpiece of the dissent’s arguments against the program. See *Zobrest*, 509 U.S. at 22 (Blackmun, J., dissenting) (stating, “This case . . . involves ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine.”).

108. As the Court stated in *Agostini*,

Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is “excessive” are similar to the factors we use to examine “effect.” That is, to assess entanglement, we have looked to “the character and

ment is simply one means of assessing whether a program has the primary effect of advancing religion, and thus that its decisions will place less weight on any "entanglement" of government with religion. So the *Zobrest* opinion may be seen to presage the development of this principle.

Instead of focusing on *Lemon*, the Court considered whether the program was neutral with respect to religion, whether any aid to religion was the result of government action or parental choice, and whether funds were paid directly to the religious school. With respect to neutrality, the Court had no trouble perceiving that the program was completely neutral with respect to the religion of the child or the religious or non-religious nature of the school he attended. As Chief Justice Rehnquist wrote, "The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-non-sectarian or public-nonpublic nature' of the school the child attends."¹¹⁰ As in *Bowen*, because the government did not intentionally discriminate in favor of or against a particular religion in either enacting the IDEA or in applying it, the program cleared the first hurdle erected by the Establishment Clause. The fact that the program was presently benefiting only a child in a Catholic school made no difference to the Court, because no discrimination for or against religion was shown.

As to the decision maker behind James's attendance, and therefore the interpreter's presence, at a religious school, the Court noted that this responsibility rested solely on the shoulders of the Zobrests. The

purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited e.g., whether the religious institutions were "predominantly religious," and the nature of the aid that the State provided e.g., whether it was neutral and non-ideological Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Waltz*—as an aspect of the inquiry into a statute's effect.

Agostini, 521 U.S. at 232-33 (citations omitted).

109. Justice Thomas wrote for the plurality:

Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. We acknowledged that our cases discussing the excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect. We also acknowledged that our cases had pared somewhat the factors that could justify a finding of excessive entanglement.

Mitchell, 530 U.S. at 807-08 (plurality opinion) (citations omitted).

110. *Zobrest*, 509 U.S. at 10.

government did nothing to encourage the Zobrests to send their son to a Catholic school and, indeed, attempted to discourage this by denying him the funds necessary for an interpreter, a privilege he would have enjoyed at a public school. The Court found this important because it meant that the government did not elect to assist Catholic schools or Catholic school students. Assuming that assigning an interpreter to translate religious speech would constitute conduct “respecting an establishment of a religion,” it was not immediately attributable to a state actor and thus could not violate the Establishment Clause. As the Court observed,

By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter’s presence there cannot be attributed to state decision making.¹¹¹

The Court also mentioned in its analysis that none of the funds were ever paid to the Catholic school, which further suggests that there was no impermissible aid to religion. The direct beneficiary of the program was James Zobrest, whose parents were presumably rational maximizers who perceived an educational benefit to their son attending a private school.¹¹² By ensuring that James could understand his teacher, the interpreter was assisting James in fulfilling his educational dreams. The Catholic school benefited from the arrangement, but only tangentially: because the Zobrests did not have to pay for an interpreter out of their own pocket, they had more capital to utilize for tuition. Therefore, if they could not afford both a private school education and an interpreter, the Catholic school would have lost James as a pupil. As the Court stated,

[U]nder the IDEA, no funds traceable to the government ever find their way into sectarian schools’ coffers. The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the disabled child’s tuition—and that is of course, assuming that the school makes a profit on each student; that, without an IDEA

111. *Id.* at 10. Notice that the Court referred to the school as “sectarian,” as opposed to “pervasively sectarian,” an adjective used to describe similar schools in previous cases. This is further evidence of the Court’s attempt to distance itself from the errors of the past, including its paranoia relating to “pervasively sectarian” institutions.

112. The Zobrests were typical Americans in that respect, since a “majority of American parents say they would send their children to private schools rather than public schools if they could afford it” STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGION* 195 (1993). Vouchers are one means by which parents can fulfill their desire to give their children a sound education.

interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.¹¹³

Bringing together the four themes of (1) neutrality, (2) independent choice, (3) a disregard for the pervasiveness of religion at the institution, and (4) the mere incidental benefit to religion, the Court observed the following in a remark highly applicable to voucher programs: "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."¹¹⁴ Two years later, the Court would draw on some of these same principles to uphold the right of students with a religious viewpoint to obtain the same opportunities provided other students at the University of Virginia.

C. *Rosenberger v. Rector and Visitors of the University of Virginia*¹¹⁵

Rosenberger involved the funding of a Christian student publication at the University of Virginia. Through a student activities fund, the school provided money to produce student periodicals.¹¹⁶ The University, however, refused to provide financial support for the publication of *Wide Awake*, a magazine with a Christian viewpoint, based on its policy against funding any material related to religion.¹¹⁷ When Christian students complained about this discrimination, the University asserted as a defense its duty to comply with the Establishment Clause.¹¹⁸ In light of the morass created by conflicting Establishment Clause decisions, one could almost understand the University's policy: better to stay clear of religion than to get involved in First Amendment litigation. In contrast, perhaps the University viewed religious speech as less worthy of funding than other forms of speech. Either way, the Establishment Clause proved to be no defense.

In yet another five to four decision, authored by Justice Anthony Kennedy, the Court again neglected to consider the University's actions in light of the *Lemon* test. Instead, much like *Zobrest*, it focused on the following: (1) the neutrality of the program; (2) the private choice behind the funding decision; and (3) the fact that the benefit to

113. *Zobrest*, 509 U.S. at 10-11.

114. *Id.* at 8.

115. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

116. *Id.* at 823.

117. *Id.* at 826.

118. *Id.* at 838.

religion was only incidental to the government's provision of secular services. Also key was the Court's unstated decision not to consider the "pervasively sectarian" nature of the speech relevant to the Establishment Clause analysis. With these key features, the Court rejected the notion that the Establishment Clause required the University to discriminate against religious publications in awarding funds.¹¹⁹

The Establishment Clause prohibits intentional government discrimination, yet the University of Virginia refused to fund any publication that "promotes or manifests a particular belief in or about a deity or an ultimate reality."¹²⁰ The key to the decision was the fact that the University's publication program was capable of distributing funds in a religion-neutral manner: "A central lesson of our decisions is that a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion."¹²¹ Neutrality means that the government is not favoring one religion over another. The Court noted that the program, as designed, was neutral with respect to religion; indeed, its object was to fund student speech generally, not religious speech or the opinions of any particular religion.¹²² "There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause."¹²³

Because anyone could apply for the funds (as in *Bowen* and *Zobrest*) and, indeed, a variety of secular groups were financed by the University, there was no preference given to a particular religion or even religion generally, and the funding of any publication was the product of private, not government, choice. Because any funding of religious viewpoints was the product of private choice (as in *Zobrest*), it could not directly be ascribable to the government and there could be no violation of the Establishment Clause. It is true that the religious viewpoint of the students would be transmitted at government expense (as in *Zobrest*), and thus religion benefited from any money it secured from the University. This benefit to religion, however, was "incidental to the government provision of secular services for secular purposes on a religion-neutral basis."¹²⁴ Therefore, the Court rejected

119. *Id.*

120. *Id.* at 825.

121. *Rosenberger*, 515 U.S. at 839.

122. *Id.* at 840 ("The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.").

123. *Id.*

124. *Id.* at 843-44.

the University's argument that the Establishment Clause would be violated were it to fund religious publications.

With respect to student vouchers, *Rosenberger* (along with *Bowen* and *Zobrest*) suggests that government funding of religious organizations that advance a particular religious viewpoint is not prohibited by the Establishment Clause so long as the money is awarded on a religion-neutral basis.¹²⁵ Because voucher programs can easily be designed to meet this requirement, it is a foregone conclusion that at least some voucher programs can withstand Establishment Clause scrutiny. This becomes even more obvious when one considers the holding of *Agostini v. Felton*, where the Court finally renounced some of its most egregious errors with respect to the Religion Clauses.

D. *Agostini v. Felton*¹²⁶

In *Agostini*, another five to four decision authored by Justice O'Connor,¹²⁷ the Court made explicit what had become apparent to many: Its Establishment Clause jurisprudence had undergone such a transformation that some of its earlier Establishment Clause decisions could not be squared with its more recent holdings.¹²⁸ *Agostini* involved a federally funded remedial education program that sent public school teachers into Catholic schools located in low-income areas, a practice that the Court held unconstitutional twelve years earlier in *School District of Grand Rapids v. Ball*¹²⁹ and *Aguilar v. Felton*.¹³⁰

125. *Id.* at 839 ("A central lesion of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

126. *Agostini*, 521 U.S. at 203.

127. The dissents were written or joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 240. These Justices are the same Justices who dissented in *Rosenberger*. 515 U.S. at 863.

128. At the same time, the new jurisprudence was consistent with the Court's earliest understanding of the Establishment Clause. See *Bradfield*, 175 U.S. at 291; *Quick Bear*, 210 U.S. at 50.

129. *Ball*, 473 U.S. at 373, *overruled in part by* *Agostini v. Felton*, 521 U.S. 203 (1997). *Ball* involved remedial and enrichment programs for students at private schools, most of which were Roman Catholic schools. *Id.* at 375. Two programs were involved. The Shared Time program involved public school teachers teaching remedial math and reading, and enrichment math, reading, art, music, and physical education for private school students on the premises of the private schools. *Id.* The second program, the Community Education program, involved courses, such as arts and crafts, Spanish, gymnastics and chess. *Id.* at 376. The classes were taught at the religious schools by part-time public school employees after regular school hours. Under both programs, the school district leased the classrooms from the private schools for \$6 per week. *Id.* at 377. Although both programs involved only private schools, the record showed that the equivalent courses were taught at public schools. *Id.*

After a bench trial, the district court granted the objecting taxpayers an injunction barring the school district from funding the programs. Both the Sixth Circuit and Supreme Court affirmed. In an opinion written by Justice Brennan, the Court held the programs unconstitutional, based solely on the possibility that the programs *might* result in the promotion of religion. *Id.* at 385.

The Court implicitly recognized that the *Ball* and *Aguilar* decisions lacked a substantial foundation even when they were decided.¹³¹ These decisions were questioned at their inception, and slowly eroded and disregarded by subsequent decisions.¹³²

Ball and *Aguilar* were based on several beliefs: (1) placing public school teachers on the premises of religious schools would result in their promotion of religion (i.e., the teachers would conform their instruction to the tenets of the particular religion);¹³³ (2) the presence of public school teachers at religious schools creates a perception that the state is endorsing the particular religion or is working in concert with it;¹³⁴ (3) the remedial education indirectly assists the schools in their religious mission by educating students in secular subjects;¹³⁵ and (4) the program created an entanglement with religion because the government needed to monitor the remedial teachers because otherwise they would teach religious doctrine.¹³⁶ Building on *Zobrest*—where the Court held that it would not presume that the translator would improperly disseminate religious speech while serving in the Catholic high school¹³⁷—and *Bowen*—in which the Court held that it would no longer presume that pervasively sectarian institutions will

Although the Court purported to apply the “primary effect” prong of the *Lemon* test, in fact, the Court speculated that three evils might arise: (1) the teachers might intentionally or inadvertently inculcate religious beliefs; (2) the programs could cause some people to perceive that government endorses the particular religions taught at the schools; and (3) the programs might provide a subsidy to the religious mission of the institutions. *Id.* at 383, 385. The Court never held that these dangers were the “primary effect” of the program, just that these dangers might arise. Indeed, Justice Brennan candidly admitted that there was no evidence that any of these dangers ever occurred. *Id.* at 388 (stating, “The Court of Appeals of course recognized that respondents adduced no evidence of specific incidents of religious indoctrination in this case.”).

When the Court wants to find a violation of the Establishment Clause “the absence of proof of specific incidents is not dispositive.” *Id.* at 388. In light of these evidentiary flaws and the poor reasoning used to create nonexistent Establishment Clause evils, it is not surprising that the Court subsequently overruled *Ball*. Under the Court’s present practice of not assuming that public employees will violate the Establishment Clause and its emphasis on the “primary effect” rather than possible secondary affects of government aid, the reasoning of *Ball* could not stand. *See, e.g., Zobrest*, 509 U.S. at 1; *Allen*, 392 U.S. at 236.

130. *Aguilar*, 473 U.S. at 402, overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

131. *Agostini*, 521 U.S. at 220 (noting that the *Ball* “Court disregarded the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant”).

132. *Id.* at 222.

133. *Id.* at 219.

134. *Id.* at 220.

135. *Id.* at 220.

136. *Id.* at 222.

137. *Zobrest*, 509 U.S. at 13 (“Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to transmit everything that is said in exactly the same way it was intended.”) (internal quotations omitted).

use government funds to proselytize¹³⁸—the *Agostini* Court similarly rejected these broad presumptions that assistance to religious schools would necessarily result in government funding of religious speech.¹³⁹ Because the paranoia behind the presumptions has no bounds, it is not surprising that the Court rejected it. Thus, the Court will not presume that unsupervised public employees will, contrary to instructions, overtly promote religion if left unattended in a private school. A litigant must, as part of his Establishment Clause case, demonstrate that this has occurred.

[W]e have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.¹⁴⁰

....

Zobrest also implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion.¹⁴¹

....

[W]e have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid.¹⁴²

....

138. *Bowen*, 487 U.S. at 612 ("nothing in our prior cases warrants the presumption adopted by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner").

139. See, e.g., *Agostini*, 521 U.S. at 234 ("But after *Zobrest*, we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment."); Compare *Levitt v. Committee for Public Educ.*, 413 U.S. 472 (1973). In *Levitt*, the Court found New York's practice of paying private schools to create and administer state mandated tests and to report student attendance levels unconstitutional. Chief Justice Burger authored the short opinion, and Justice White was the sole dissenter. The Court purported to apply the *Lemon* test to the program. It had no problem finding a secular purpose; the defect was the possibility that the funds could be used to inculcate religion. The Court reasoned, "We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Id.* at 480. Thus, because there were inadequate safeguards against state-funded indoctrination, the Court held the program to constitute an impermissible aid to religion. Thus, under *Levitt*, the mere possibility that government funds might be used for a religious purpose was enough to doom a program. It is not surprising that the Court later distanced itself from this view in *Agostini v. Felton*, at least with respect to public employees operating in religious schools. The Court held in *Agostini* that it will not presume that unsupervised public employees will, contrary to instructions, overtly promote religion if left unattended in a private school.

140. *Agostini*, 521 U.S. at 223.

141. *Id.* at 224.

142. *Id.* at 225.

Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees.¹⁴³

Central to the Court's holding of constitutionality was the neutrality of the program at issue: the "aid is provided to students at whatever school they choose to attend."¹⁴⁴ Thus, the government program does not discriminate on the basis of where parents choose to send their children. The government remained completely neutral on the issue of school choice, but once that decision was made by the parents, the government did not penalize them for sending their children to a religious school. The Court specifically declined to place any emphasis on the number of religious students who benefited from the program;¹⁴⁵ thus, a program that benefits only religious school students, so long as there is no intentional discrimination against other students, does not violate the Establishment Clause.¹⁴⁶

The Court modified the excessive entanglement analysis of *Lemon* for the better. It recognized that the entanglement question is closely related to the effect question, so that the two are sometimes inseparable. Accordingly, the Court announced that it would henceforth ask (1) whether a church-state entanglement is "excessive"¹⁴⁷ and (2) whether it has the primary effect of advancing or inhibiting religion.¹⁴⁸ Without a showing of these two elements, the program will be held constitutional.¹⁴⁹ Furthermore, the fact that a program requires "administrative cooperation" between the government and a school or might increase the danger of political divisiveness¹⁵⁰ does not mean

143. *Id.* at 234.

144. *Id.* at 228.

145. *Id.* at 229 (noting, "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.").

146. *Agostini*, 521 U.S. at 229-30.

147. *Id.* at 233 (stating that "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause.").

148. *Id.* (stating that "it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect").

149. *Id.* (noting that "[t]he pre-Aguilar Title I program does not result in an 'excessive' entanglement that advances or inhibits religion.").

150. *Agostini*, however, apparently did not dissuade adherents of the divisiveness analysis from using this weapon in the barrage against religion practices. For example, Justice Stevens, writing for the majority in *Santa Fe Independent School District v. Doe*, opined that the mechanism used by the school district to select a student to present the invocation before football games "encourages divisiveness along religious lines in a public school setting, a result at odds

that the program necessarily fosters excessive entanglement that advances religion. Rather, these are simply two factors to be considered in the analysis. Because the advancement of religion was not the primary effect of the program, the Court reversed the precedent it had set in *Aguilar* and *Ball* and held that the program did not violate the Establishment Clause.¹⁵¹ The Supreme Court would further build on these principles as its Establishment Clause jurisprudence continued to evolve in *Mitchell v. Helms*.

*E. Mitchell v. Helms*¹⁵²

Mitchell involved a school aid program, known as Chapter 2,¹⁵³ by which the federal government distributes funds to state and local governments that in turn lend educational materials and equipment to public and private schools.¹⁵⁴ The equipment includes reference materials, computer hardware and software, and other educational materials. For example, in *Mitchell*, the private schools used Chapter 2 funds to acquire library books, computers, slide and movie projectors, maps, globes, and videocassette recorders.¹⁵⁵ Under Chapter 2, the amount of aid received by private schools depends on the number of children enrolled in each school.¹⁵⁶ To obtain aid, the private school must submit an application to a local agency detailing the items sought and the way in which the materials will be used.¹⁵⁷ The type of aid provided to private schools is restricted.¹⁵⁸ Specifically, the materials provided must be "secular, neutral, and nonideological," and the private schools are prohibited from acquiring Chapter 2 funds or title to materials purchased with the funds.¹⁵⁹ Most of the schools participating in the program addressed in *Mitchell* were affiliated with the Roman Catholic Church, which resulted in an Establishment Clause challenge to the program.¹⁶⁰

with the Establishment Clause." *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 311 (2000). For a good discussion of the "divisiveness" question, see generally Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

151. *Agostini*, 521 U.S. at 234-35.

152. *Mitchell*, 530 U.S. at 793 (plurality opinion). The plurality consisted of Justices Rehnquist, Scalia, Kennedy, and Thomas. *Id.*

153. "Chapter 2" is now codified as Subchapter VI of Chapter 70 of 20 U.S.C. *Mitchell*, 530 U.S. at 801 n.1 (plurality opinion).

154. *Id.* at 801.

155. *Id.* at 803.

156. *Id.* at 802.

157. *Id.* at 803.

158. *Id.* at 802.

159. *Mitchell*, 530 U.S. at 802.

160. *Id.* at 803-4.

In addressing this challenge, the *Mitchell* plurality noted that there was no suggestion that the program had an impermissible purpose; rather, the only complaint was that it had the impermissible effect of advancing religion.¹⁶¹ The Court assessed this argument under the three primary criteria used in *Agostini*: (1) whether the government aid results in government indoctrination; (2) whether it defines recipients by reference to religion; and (3) whether it creates an excessive entanglement of religion and government.¹⁶²

Under this framework, the *Mitchell* plurality found the concept of government neutrality to be particularly important, especially with respect to judging whether there was any governmental indoctrination involved.¹⁶³ Awarding governmental assistance on a religion-neutral basis usually ensures that a government program does not place the government in a position that supports any indoctrination.¹⁶⁴ Closely connected to neutrality is private choice because government neutrality can often be assured by awarding government aid on the basis of the private decisions of the citizenry. That is, programs that assign benefits to religious institutions based solely on the private preferences of the citizenry make it difficult for the government to favor a particular religion. "If numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."¹⁶⁵ Where private choice is operating, there is no danger that the "imprimatur of state approval can be deemed to have been conferred on any particular religion."¹⁶⁶ This principle was demonstrated in various prior opinions, such as *Witters*, *Rosenberger*, and *Zobrest*.¹⁶⁷ In accordance with these decisions, the *Mitchell* Court held that the government aid did not result in government indoctrination.¹⁶⁸

Moving on to the second *Agostini* criterion, whether recipients are defined by religion, the Court again found neutrality and private

161. *Id.* at 808 (stating, "respondents do not challenge the District Court's holding that Chapter 2 has a secular purpose . . .").

162. *Id.* (quoting *Agostini*, 521 U.S. at 234).

163. *Id.* at 829 (noting that Chapter 2 aid is allocated on the basis of neutral, secular criteria); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

164. *Mitchell*, 530 U.S. at 809.

165. *Id.* at 810.

166. *Id.* at 813 (quoting *Mueller*, 463 U.S. at 397).

167. *Id.* at 810-11 (stating, "The principles of neutrality and private choice, and their relationship to each other, were prominent . . . in *Zobrest*, *Witters*, and *Mueller*"). See the discussion of these cases, *supra*.

168. *Id.* at 812-13.

choice to be relevant.¹⁶⁹ Because private choice leads to neutrality and religious-neutrality by definition means that religion is not a defining criteria, under a neutral system, government aid is never awarded according to the religion of its recipients. Under this second *Agostini* criterion, the Court looks closely at whether the government aid program defines recipients by reference to religion so as to create a direct incentive for religious indoctrination.¹⁷⁰ In *Mitchell*, both religious and nonreligious schools received the government aid, thus creating no incentive for parents to send their children to schools that teach religion. For example, no parent would choose to send his or her child to a religious school simply because the religious school received government-funded tape recorders, because government-funded tape recorders are also available at public and nonreligious private schools. Thus, government aid created no further incentive to send a child to a religious school; an inclination to do so must have existed independent of the government aid. Accordingly, the Court held that the program at issue did not define its recipients according to religion and did not result in additional incentive to religious indoctrination.¹⁷¹

In addressing the plaintiff's arguments, the plurality also made clear that the distinction between direct and indirect aid to religious schools had little constitutional relevance.¹⁷² Similarly, building on what was implicit in *Bowen*, *Zobrest* and *Rosenberger*, the plurality finally took the extra step of explicitly renouncing the Court's prior practice of assessing whether an institution is "pervasively sectarian."¹⁷³ The plurality opined that this criteria was a thinly-veiled attempt by the Court to violate the Establishment Clause by discriminating against Roman Catholic institutions.¹⁷⁴ Finally, the plurality suggested that some mi-

169. *Mitchell*, 530 U.S. at 813.

170. *Id.* In *Agostini*, the Court observed that an incentive for religious indoctrination is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

171. *Mitchell*, 530 U.S. at 814.

172. *Id.* at 815-16.

173. Recall that in *Bowen v. Kendrick*, Chief Justice Rehnquist made a weak statement that the pervasively sectarian nature of some of the recipients made no difference because they were just a minority of the recipients. *Bowen*, 487 U.S. at 610-11. As Justice Blackmun's dissent in *Zobrest* made clear, the Catholic High School would have qualified as pervasively sectarian by virtue of its many religious attributes. *Zobrest*, 509 U.S. at 18-19 (Blackmun, J., dissenting). Yet the Court made no mention of this factor being even slightly relevant to its analysis. Similarly, in *Rosenberger*, the publication at issue, *Wide Awake*, presented only a Christian viewpoint, making it completely sectarian. Yet again, this fact was not even mentioned by the Court. So it's not surprising that the *Mitchell* plurality made explicit what had been implicit for some time.

174. *Mitchell*, 530 U.S. at 828.

nor diversion of government-funded materials for religious education is not grounds for invalidating a program on Establishment Clause grounds.¹⁷⁵ Unfortunately, however, the Court's opinion by Justice Clarence Thomas was only a plurality opinion, making it difficult to tell how far the Court is willing to extend the reasoning of the *Mitchell* opinion.¹⁷⁶

Justices Sandra Day O'Connor and Steven Breyer joined the judgment, but not the reasoning of *Mitchell*. In a concurring opinion written by Justice O'Connor, these two Justices agreed with the plurality that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges."¹⁷⁷ Justice O'Connor, however, would not give as much deference to neutral programs as would the plurality. In her view, the Court has "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."¹⁷⁸ Further, she stated that the "direct/indirect aid" distinction has some utility and that the diversion of government-funded materials is still a ground for invalidation.¹⁷⁹ She did, however, seem to agree that private choice is particularly important to the constitutionality of government funding, suggesting that in the future she—and thus a majority of the Court—will vote to uphold programs where aid flows to religious institutions only as a result of private choice.¹⁸⁰ Because school vouchers are simply a vehicle for effectuating private choice, it seems that Justice O'Connor, along with the plurality, will uphold their constitutionality. Thus, the whole line of cases from *Bowen* to *Mitchell* bodes well for voucher supporters.

175. *Id.* at 834 ("the evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry . . .").

176. The reasoning of a plurality opinion does not necessarily create the law for subsequent cases. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted). Thus, to the extent that Justice O'Connor's concurrence is narrower than the majority's reasoning, it is the law that binds the lower courts.

177. *Mitchell*, 530 U.S. at 838 (O'Connor, J., concurring).

178. *Id.*

179. *Id.* at 837.

180. *Id.* at 842 (O'Connor, J., concurring).

IV. *SIMMONS-HARRIS V. ZELMAN*A. *Background*

The school voucher program in *Simmons-Harris* that produced so much litigation ironically resulted from litigation over the quality of the Ohio schools. Previously, a federal district court had placed management of the schools under the supervision of the State Superintendent of Public Instruction.¹⁸¹ In response, the Ohio legislature in 1995 enacted the voucher program, which covers the districts placed under the state's supervision.¹⁸² Among these were the Cleveland schools.¹⁸³ The program provides scholarships to children in these districts from kindergarten through middle school, and gives a strong preference to underprivileged students. Indeed, over sixty percent of the families that received vouchers had incomes at or below the poverty line.¹⁸⁴

The vouchers provide money directly to parents in the form of checks that are sent to the schools.¹⁸⁵ The parents must then endorse the check before the school can obtain any of the funds.¹⁸⁶ Once the checks have been endorsed, there is no limitation on what the schools may do with the funds.¹⁸⁷ The parents select the school they want their child to attend.¹⁸⁸ They may select any private school in their district or any public school adjoining the district, so long as these schools are willing to accept the student.¹⁸⁹ Participating schools may not discriminate on the basis of religion. The parents face no government coercion to send their children to a religious or nonreligious school, although for reasons unrelated to the government, most of the participating schools are sectarian.¹⁹⁰ In the 1999-2000 school year,

181. *Simmons-Harris*, 234 F.3d at 948, *petition for cert. granted*, 122 S. Ct. 23 (2001).

182. OHIO REV. CODE § 3313.975(A) (1995).

183. *Simmons-Harris v. Geoff*, 711 N.E.2d 203, 205 (1999).

184. *Simmons-Harris*, 234 F.3d at 948.

185. *Id.*

186. *Id.* ("Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.").

187. *Id.* at 949.

188. *Id.* at 948.

189. The *Simmons-Harris* majority made much of the fact that at the time the suit was filed, no public schools had accepted students from adjoining districts. Because of this, the vouchers were being used only at private schools.

190. Specifically, as in *Nyquist*, most of the schools are operated under the auspices of the Roman Catholic Church. This is because the Roman Catholic Church had a system of schools in place long before the voucher program was instituted. This system of educational institutions arose, in part, because Roman Catholics historically faced discrimination in public schools.

3,761 students were enrolled in the voucher program, with 3,632 (or ninety percent) attending sectarian schools.¹⁹¹

The amount paid to each family depends on family income and the cost of tuition. Ohio will pay up to ninety percent of whatever tuition the private school charges low-income families, up to \$2,500, and seventy-five percent of tuition for other families, up to \$1,875.¹⁹² The number of scholarships awarded each year is limited by the amount of money allocated by the Ohio legislature.¹⁹³ None of the money is earmarked for teaching either secular or religious subjects, although the Sixth Circuit made much of the fact that the sectarian schools “believe in interweaving religious beliefs with secular subjects.”¹⁹⁴

The program was the subject of a previous lawsuit in the Ohio courts. In fact, the case made its way to the Ohio Supreme Court, which held that the law authorizing the voucher program violated the one-subject rule of the Ohio constitution.¹⁹⁵ The court, therefore, invalidated the scheme, but not before opining that it withstood scrutiny under the Establishment Clause.¹⁹⁶ The Ohio legislature subsequently re-enacted the program, this time complying with the Ohio Constitution. It was this law that a federal district court held to violate the Establishment Clause,¹⁹⁷ a decision that the Sixth Circuit reviewed.¹⁹⁸

B. *The Sixth Circuit’s Analysis*

Judge Clay delivered the opinion for the divided panel. The court began its analysis by noting some of the changes that have occurred in Establishment Clause jurisprudence. The court believed that the *Lemon* test was the proper test to apply to the voucher program.¹⁹⁹ Although the court paid lip service to cases expressing the contemporary Establishment Clause jurisprudence, such as *Agostini v. Felton*²⁰⁰ and *Mueller v. Allen*,²⁰¹ it instead elected to follow outdated cases, such as *Nyquist*,²⁰² finding it to be “the most persuasive” and “on

191. *Simmons-Harris*, 234 F.3d at 949.

192. OHIO REV. CODE §§ 3313.976(A)(8), 3313978(A) (1995).

193. *Simmons-Harris*, 711 N.E.2d at 205.

194. *Simmons-Harris*, 234 F.3d at 949.

195. *Simmons-Harris*, 711 N.E.2d at 203.

196. *Id.*

197. *Simmons-Harris*, 72 F. Supp. 2d 834.

198. *Simmons-Harris*, 234 F.3d at 949-50.

199. *Id.* at 953.

200. *Agostini*, 521 U.S. at 203.

201. *Mueller*, 463 U.S. at 388.

202. *Simmons-Harris*, 234 F.3d at 958 (stating, “We find that *Nyquist* governs our result.”).

point with the matter at hand.”²⁰³ The court based its decision on two main points: (1) *Nyquist* was so factually similar that it controlled; and (2) the program was not neutrally available to all students.²⁰⁴

1. *Vouchers and Nyquist*

In considering the Ohio program, the court held that the present scheme was exactly like the tuition reimbursement program at issue in *Nyquist*.²⁰⁵ According to the court, under both systems, low-income

203. *Simmons-Harris*, 234 F.3d at 953. The court's fixation with *Nyquist* and its purported concomitants brings to mind the words of Justice Benjamin N. Cardozo, which aptly describe the actions of the *Simmons-Harris* majority as it followed the dictates of the judicial religion:

Judges march at times to pitiless conclusions under the prod of a remorseless logic, which is supposed to leave them no alternative. They deplore the sacrificial rite, they perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 66 (1924).

204. *Simmons-Harris*, 234 F.3d at 959 (stating, “Despite the language of the statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance . . .”).

205. *Id.* at 958. On the same day that the Court decided *Levitt*, it decided *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, which addressed a New York statute that provided both direct aid to private schools and financial incentives to parents of private school students. 413 U.S. 756 (1973). Specifically, New York provided direct grants to qualifying private schools that were to be used for repair of school buildings, tuition reimbursements to children attending private schools, and a tax credit for parents of private school students. *Id.* at 762, 764. The Court unanimously held the direct aid to be unconstitutional, but it split 6-3 on the tuition reimbursement and the tax relief, with Chief Justice Warren Burger dissenting along with Justices Byron White and William Rehnquist.

In an opinion for the majority, Justice Lewis F. Powell set forth some important principles that the Court has subsequently used in deciding school aid cases. First, it reiterated that, despite its name, the Establishment Clause will be held to preclude even laws that do not establish a religion. It will be used by the Court to invalidate those laws that “benefit all religions alike.” *Id.* at 771. Furthermore, the court applied the *Lemon* test, indicating again that the failure to meet any of the three criteria would result in invalidation. *Id.* at 773. As to the primary effect prong, direct aid to a religious institution will be considered as having a primary effect of advancing religion. *Id.* at 774 (stating that “[i]t simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools”). It is also worth noting that the portion of the program that provided direct aid to religious schools was held unconstitutional by every member of the Court.

But the Court also softened some of its prior Establishment Clause language and practices. For example, the Court indicated that it will not question a stated legislative purpose for a statute that seems plausible on its face. Thus, the Court accepted New York's asserted purpose for the law: the interest in preserving a healthy and safe education environment for all students, promoting diversity, and assisting an overburdened public school system by making sure that private school students did not flood the public school classrooms en masse. *Id.* at 773. Of course, the Court may have applied a light touch in assessing the asserted state interests because it knew that it was going to invalidate the law on the “primary effect” prong of *Lemon* anyway. But the Court also pruned back some of its earlier language as to the “primary effect” prong of *Lemon*. Thus, although this criterion purports to invalidate any law that benefits any religion—a broad pronouncement indeed—*Nyquist* recognizes the irrationality of such a rule and its contradiction to the holdings of *Everson* and *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (noting that

parents received funds to help defray the costs of sending their children to private schools. As in *Nyquist*, the majority of the money ended up supporting sectarian schools.²⁰⁶ The court correctly perceived that it was irrelevant that the parents in *Nyquist* received a grant, a reimbursement, or a tax credit²⁰⁷ because each are simply different forms of the same government aid. Similarly, in both cases, no steps were taken to ensure that government funds were used only for secular education; it was possible, though not proven, that the funds were used by the schools to fund religious education.²⁰⁸ Because of the identity with *Nyquist*, the Sixth Circuit held that it controlled and that the Cleveland program was unconstitutional for the same reasons.²⁰⁹

2. No Neutrality

The Sixth Circuit also based its decision on its belief that the tuition vouchers were not distributed in a religiously-neutral fashion.²¹⁰ The

property tax exemption for church property does not violate the Establishment Clause even though this benefits religion by relieving those churches of the financial burden of paying property taxes). Therefore, only state aid that provides substantial and direct benefits to a religion will be invalidated. *Id.* at 771 (stating that “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon religious institutions is, for that reason alone, constitutionally invalid.”). The Court previously made this point in other cases, including *McGowan v. Maryland*, where it recognized that upholding Sunday closing laws would have the effect of promoting religious observance of Sunday as a Christian holy day. *McGowan v. Maryland*, 366 U.S. 420, 441 (1961).

The *Nyquist* court also held, somewhat contrary to *Everson*, that providing parents with reimbursement for tuition paid to religious schools also had the effect of impermissibly aiding religion. The Court so held even though the reimbursements were paid directly to the parents, and not the religious institutions. The Court stated that this indirect payment was “only one among many factors to be considered” in the “primary effect” analysis. *Nyquist*, 413 U.S. at 781. The key point for the Court in *Nyquist* seemed to be that the reimbursement was paid only to children in private schools, whereas *Everson* and *Tilton* involved aid to both public and private school students. *Id.* at 782 n.38. Finally, contradicting what it previously said about indirect benefits to religion not offending the Establishment Clause, the Court focused on the fact that the money could have been used by parents to fund religious education. It contrasted this with *Everson*, where the funds went solely for transportation expenses and thus could not be used to subsidize a religious education. *Id.* at 783. The Court was being disingenuous here, as the parents could have used the reimbursement in *Everson* or *Nyquist* for anything they chose. As in *Everson*, the reimbursement program provided no direct funding to schools, so the parents’ choice was an intervening cause between the government and any indirect benefit to religion. *Nyquist*, 413 U.S. at 811 (Rehnquist, J., dissenting). To withstand scrutiny under *Nyquist*, then, a voucher program apparently will survive the *Lemon* “effect” analysis only where it (1) is available to both public and private schools students and (2) is paid to the parents and not a religious institution.

206. *Simmons-Harris*, 234 F.3d at 958.

207. *Id.*

208. *Id.* In cases like *Zobrest* and *Agostini*, the Court has moved away from its former practice of presuming that when the state and religious schools work together, both will ignore the Constitution and will act so as to violate the Establishment Clause.

209. *Id.* at 961.

210. *Id.* at 959.

court was forced to concede that the voucher program does not restrict entry to only religious schools, but facial neutrality was not enough.²¹¹ Because the program created a disparate impact—that is, it resulted in greater participation by religious schools than by secular ones—the court believed that it violated the Establishment Clause, apparently under the primary effect prong of *Lemon*.²¹² As the court put it,

The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs.²¹³

Notably, the court never identifies any way in which the state *actively* “discourages participation by schools not funded by religious institutions.”²¹⁴ Any disparity was an unintended effect of circumstances unrelated to religion yet it still elected to strike down the program.

V. *SIMMONS-HARRIS*, VOUCHERS, AND THE EVOLVING ESTABLISHMENT CLAUSE JURISPRUDENCE

The United States Supreme Court’s understanding of the Establishment Clause has obviously meandered over the years, sometimes turning toward greater church-state cooperation, and sometimes endorsing an impregnable wall of separation. As *Agostini v. Felton* and *Mitchell v. Helms* demonstrate, the Court’s present course is much more accommodating of a church-state relationship based on mutual respect.²¹⁵ Slowly, the Court seems to be coming back to its original understanding that church and state can peacefully coexist, and that the interests of the two do indeed frequently run along a parallel course, as each is essential to maintaining an ordered and moral society.²¹⁶ Realizing this, the Court has been more tolerant of coopera-

211. *Simmons-Harris*, 234 F.3d at 959.

212. *Id.*

213. *Id.*

214. *Id.*

215. See also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

216. Government and religion are “the regulative agencies by which men are restrained and the social interest in general security is protected.” ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 139 (Marshall Jones Co., 1921). Government is based on law, and law is based on morality, frequently religious morality. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (stating that “[t]he law, however, is constantly based on notions of morality . . .”); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (stating that

tive church-state ventures, particularly when there is a pronounced secular benefit to the venture. Thus, for example, in *Bowen v. Kendrick*, the Court upheld government funding of religious organizations that counseled, consistent with the groups' Roman Catholic morality, against premarital sex. If successful, the teenage pregnancy rate would drop, a boon for society and the taxpayers.²¹⁷ Because both the Roman Catholic organization and the government wanted to curtail teenage pregnancies and the religious groups were simply an effective means of serving this important government interest, the Court perceived no Establishment Clause bar to government cooperation with religion.²¹⁸

Similarly, since the founding of the Nation, America's leaders have recognized that education, including religious education, is vital to the life of the State,²¹⁹ as education is the key to both society's moral and material success.²²⁰ Most religions also seek a better-educated populace, with respect to both ethics and more "secular" pursuits. In the

"[n]either government nor this Court can or should ignore the significance of the fact that . . . many of our legal . . . values derive historically from religious teachings."). Thus, more often than not, mainstream religions and the government will pursue the same goals: a moral, law-abiding citizenry that is also financially secure.

217. *Bowen*, 487 U.S. at 612-13 (stating that "[o]n an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions.").

218. *Id.*

219. The Framers "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring). William Bennett collected a number of excerpts from the speeches and writings of America's Founders, all demonstrating that these wise men saw religious education as indispensable to the creation of a prosperous nation.

From devout churchgoers to rationalizing deists, the Founders spoke with one voice about the importance of including religion in civic life. Washington, a Virginia Episcopalian, warned in his Farewell Address: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . and let us with caution indulge the supposition that morality can be maintained without religion." John Adams, a Massachusetts Unitarian, agreed in no uncertain terms: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Madison, another Episcopalian, insisted that "before any man can be considered a member of Civil Society, he must be considered as a subject of the Governor of the Universe." And even Jefferson agreed. Jefferson, the great deist who was always skeptical of sectarianism in any form, asked, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are a gift of God? Religion, he concluded, should be regarded as "a supplement to law in the government of men," and as "the alpha and omega of the moral law."

WILLIAM J. BENNETT, *OUR CHILDREN AND OUR COUNTRY: IMPROVING AMERICA'S SCHOOLS AND AFFIRMING THE COMMON CULTURE* 169 (1988).

220. Morality can be taught in various ways, and it need not always be done overtly. Thus, even education in mathematics and the sciences can have moral dimensions. All "education is moral education because learning conditions conduct" GEORGE F. WILL, *STATECRAFT AS*

area of education, at least, government and religion have overlapping interests: both see the multifaceted value of education and both desire to promote excellence in education. In light of this common interest, it is surprising that some courts, like the Sixth Circuit, dwell only on the religious aspect of private school education. In doing so, they fail to appreciate all that religious schools have to offer through educational opportunities, particularly in those communities where such opportunities are scarce. More importantly, courts like the Sixth Circuit have failed to perceive the import of the new Supreme Court jurisprudence.²²¹ In particular, they have not grasped the fact that programs that operate on a religion-neutral basis will seldom, if ever, violate the Establishment Clause.

A. Government Neutrality

The Court has long made neutrality the cornerstone of its Establishment Clause jurisprudence.²²² As Justice Clark stated in *Schempp*, "In the relationship between man and religion, the State is firmly committed to a position of neutrality."²²³ Further in *Roemer*, the plurality observed the following: "Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity."²²⁴

It is true that the Court occasionally departed from its practice of deferring to neutral programs, but even when it did so it paid lip service to the neutrality principle. Thus, in *Ball*, Justice William Brennan wrote that the Establishment Clause requires "the government to maintain a course of neutrality among religions, and between religion and nonreligion."²²⁵ More recently, the Court has made clear that neutrality is the keystone to any compliance with the Establishment Clause. For example, the Court in *Board of Education of Kiryas Joel Village School District v. Grumet* stated, "[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause chal-

SOULCRAFT: WHAT GOVERNMENT DOES 19 (1983). Accordingly, educational deficiencies can manifest themselves in the form of morally-deficient conduct, such as violent crime.

221. See, e.g., *Simmons-Harris*, 234 F.3d at 959.

222. See *Mueller*, 463 U.S. at 400 (stating, "The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefits at issue in this case.").

223. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 226 (1963).

224. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion).

225. *Ball*, 473 U.S. at 382, *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997).

lenges.”²²⁶ The next year, in *Rosenberger v. Rector and Visitors of the University of Virginia* where the University of Virginia claimed that the Establishment Clause prevented it from funding a pervasively sectarian journal, the Court offered the following: “A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.”²²⁷ *Agostini* reiterated this principle, and so it was no surprise that the *Mitchell* plurality made neutrality the key aspect of its reasoning. It offered,

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that a particular recipient conducts has been done at the behest of government.²²⁸

Neutrality is important because the Establishment Clause primarily prohibits favoring one religion over another,²²⁹ which is what happens when a government establishes a state religion or passes a law “respecting” an establishment of religion. But if all religions are treated equally—that is, neutrally—there is no danger of an official establishment of religion or the strife that such an establishment could entail.²³⁰ The jealousies of seeing a competing religion being favored by the government should not be inflamed where opportunities are accessible to all citizens and where public money is distributed without regard to the recipients’ religious beliefs. No one can claim favoritism when a government program does not discriminate against adherents of a particular religion or those who espouse no particular faith.

In light of the importance the Court has placed on neutrality²³¹ and the equality of access inherent in voucher programs, it is particularly

226. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994).

227. *Rosenberger*, 515 U.S. at 839.

228. *Mitchell*, 530 U.S. at 809-10 (plurality opinion).

229. It is true that the Court has also said that the Establishment Clause prohibits the government from favoring religion over non-religion.

230. “The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise or in the favoring of religion as to have meaningful and practical impact.” Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

231. *Rosenberger*, 515 U.S. at 839 (stating, “We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”).

surprising that the Sixth Circuit arrived at the decision it did. The program at issue was nothing if not neutral. First, the program was neutral as to awarding the vouchers to the participating children. No one was excluded from receiving a voucher on the basis of his or her religious beliefs or lack of beliefs. True, lower income families were favored, but there was no indication that there is a correlation between lower financial status and the espousal of religious beliefs.²³² Furthermore, the selection of which school the children would attend was completely a function of private choice. As the plurality noted in *Mitchell*, private choice is indicative of government neutrality.²³³ Private choice "helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid programs."²³⁴

Second, the schools were also treated in an evenhanded fashion. No school was denied participation in the voucher program because it espoused a particular faith or no faith at all. It is true that some public schools in neighboring districts elected not to participate, but no one disputes that they were free to do so if they so chose. Like the parents, the school districts also had a choice. The same vouchers that were offered to private schools were offered to public schools in neighboring districts. The equality of treatment was indisputable.

In light of these facts, the Sixth Circuit's opinion is in serious conflict with the basic principles of the Establishment Clause jurisprudence that was reiterated in *Mitchell* and existed in many cases even before *Mitchell*.²³⁵ Realizing this, the Sixth Circuit attempted to get around this problem by twisting the notion of "neutrality." The court believed that the equality of opportunity was irrelevant where the funds offered were beneath the dignity of public school attention and where most of the entities willing to accept them were religious ones. In short, the court found the program unconstitutional because either the Ohio legislature did not set the bounty high enough for there to be

232. In fact, there is probably an inverse correlation, because many of the beliefs and practices of mainstream religions promote healthy lifestyles and potentially wealth-generating attributes. See William J. Strawbridge et al., *Religious Attendance Increases Survival by Improving and Maintaining Good Health Behaviors, Mental Health, and Social Relationships*, 23 ANNALS OF BEHAVIORAL MED. 68 (Feb. 2001) (discussing study which concludes regular churchgoers lead healthier lives by, for example, refraining from excessive drinking and smoking); Michael Novak, *How Christianity Created Capitalism*, WALL ST. J. Dec. 23, 1999, at A-19; see generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1920) (discussing the correlation between Protestantism and financial success).

233. *Mitchell*, 530 U.S. at 810 (plurality opinion).

234. *Id.*

235. See, e.g., *Agostini*, 521 U.S. 203; *Rosenberger*, 515 U.S. at 819.

true equality of access or because the financial standards of religious schools were too low as compared with the public schools.

B. Insufficient Funding

The Sixth Circuit's analysis on neutrality and the amount of financial aid offered in each voucher is seriously flawed. The court conceded that the program was framed in neutral terms.²³⁶ Its problem was with the way the program operated. Because of the public school's refusal to accept vouchers, the program ended up providing assistance only to parochial school students. The court contrasted this to the *Witters* case, where all blind students, regardless of what school they attended, could receive government funds.²³⁷ Although, by its terms, the Cleveland program does not intentionally discriminate against public school students (i.e., there is no disparate treatment), in the short term, it had the effect of aiding only private school students. Importantly, there is nothing in the opinion suggesting intentional discrimination against students who want to use a voucher to attend a public school or public school students who want to use a voucher to attend a private school. Surely the School District did not hide the appropriate forms whenever an administrator from a private, non religious school asked about joining the program. Similarly, there was no evidence that the state threatened violence to any parent who wanted to send his child to a nonreligious school.

The words of the Sixth Circuit demonstrate that it based its decision on a disparate impact theory: "Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs."²³⁸ What the Sixth Circuit finds objectionable, then, is not any overt discrimination against non-religious schools, but the way in which the religious schools are run that allows students of those schools to take full advantage of the tuition vouchers. At the core, the Sixth Circuit has a problem with facets of religious schools that are tangential to their central religious mission and not peculiar to religious schools. These nonreligious features permit those schools to make due with the amount of tuition offered by the state, while for other reasons various private and public schools

236. *Simmons-Harris*, 234 F.3d at 959 (stating, "Admittedly, the voucher program does not restrict entry into the program to religious or sectarian schools . . .").

237. *Id.* at 960. The *Witters* case is discussed in section IV-C *infra*.

238. *Id.* at 959.

cannot. In particular, the court identified the ability of religious schools to maintain lower overhead and solicit donations.²³⁹

One of several problems with the court's reasoning is that these attributes are not intimately connected to religion. Many schools—religious and otherwise—keep their overhead to a minimum. Although because of limited resources religious schools may be forced to be thriftier than others, there is nothing preventing public schools or non-religious private schools from similarly tightening their belts. The same reasoning applies to the solicitation of donations. Although donations to public elementary and secondary schools have not traditionally been part of the public school landscape, there is nothing preventing this from becoming commonplace. Certainly it is quite common for public and nonreligious private universities to solicit donations and bequests. Take for example, Harvard University—a private, nonreligious school—which is the frequent beneficiary of private donations. In short, there is no essential correlation between the religiosity of a school and its ability to make due with less money, particularly less government money.

The court might have been implying that the religious schools can “afford” to pay their teachers less than public school teachers. Although in many religious schools the teachers earn less than their public school counterparts, low wages are not inherently and exclusively part of religious schools. It is true that at one time many Catholic schoolteachers were nuns who were willing to work for poverty wages, but that is no longer the case (and even when the nuns did occupy most teaching positions at Catholic schools, their paltry salaries were not the sole cause of the Catholic school's efficiency.²⁴⁰) By far, the majority of Catholic schoolteachers are dedicated lay people who work for a regular wage, although they usually receive less monetary compensation than public school teachers enjoy. Theoretically, there is nothing to prevent public schools or nonreligious private schools from reducing salaries in an effort to compete with religious schools.²⁴¹ To the extent that public school officials are reluctant to

239. *Id.*

240. At St. John Chrysostom elementary school in the Bronx, the “cost per pupil is far less than in public schools even after account is taken of the free services of those teachers who are nuns.” MILTON AND ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 159 (1980). Friedman plainly states the cause of this efficiency: “Control has been taken away from bureaucrats and put back where it belongs.” *Id.*

241. Some might argue that religious schools have an advantage not enjoyed by other schools insofar as they can pay lower salaries to the extent that they are exempt from the National Labor Relations Act, and thus need not fear adverse union activity. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (holding that the NLRA does not apply to religiously-affiliated schools). The import of *Catholic Bishop of Chicago* is that religious schools are under no

do so, students should not be deprived of a voucher to attend a school of their choice.

More importantly, the analysis of a voucher program according to the Establishment Clause should not turn on the fact that religious elementary schools have become experts at fundraising and thriftiness. Indeed, it is preposterous to suggest, as the Sixth Circuit does, that the constitutionality of a voucher program turns on the fact that religious schools are willing to accept students for \$2,250, but non-religious schools are not.²⁴² Presumably, there is some threshold amount that would entice nonreligious schools to participate, say, \$7,000 per pupil. Apparently at that point, the program would then be constitutional, as both religious and nonreligious schools would compete for students. This distinction, and the reasoning upon which it is based, makes no sense. Indeed, under this reasoning, religious schools would also be receiving almost \$5,000 more per pupil. Theoretically,

statutory duty to collectively bargain with labor representatives of teachers; also, religious schools may fire teachers who seek to organize a union, because they are not constrained by Sections 8(a)1 or 8(a)3 of the NLRA. 29 U.S.C. § 158(a)(1) and (3). Nevertheless, there is no indication that a religious school has ever made use of this exemption by, say, terminating an employee for attempting to organize a union. Furthermore, some Catholic school teachers have formed unions and negotiated agreements with Catholic schools even in the absence of NLRA protection. Also, public schools enjoy the same advantage that religious schools do in that they too are not subject to the NLRA. 29 U.S.C. § 152(2) (exempting public schools from coverage by the NLRA political subdivisions of States); *Strasburger v. Bd. of Educ.*, 143 F.3d 351, 359 (7th Cir. 1998) (county school board is a political subdivision of a State and therefore not covered by the Labor Management Relations Act); *Carmen v. San Francisco Unified Sch. Dist.*, 982 F. Supp. 1396, 1409 (N.D. Cal. 1997).

On the other hand, some states have elected to make themselves subject to restrictions similar to those of the NLRA. See *Columbia Transit Corp. v. Jones*, 572 F.2d 168, 170-71 (8th Cir. 1978) (discussing the Minnesota Public Employees Labor Relations Act of 1971, which is "roughly parallel to the NLRA" and extends "to employees who are not covered by the Act."). Furthermore, most states have elected to subject government employers to "prevailing wage" laws, similar to the federal Davis-Bacon Act, which could constrain a local school board's ability to reduce wages. But before anybody weeps for the local school boards, it should be remembered these constraints are voluntarily imposed by the States themselves, and they are free to change their own laws if necessary to make their schools competitive with private institutions.

242. The Sixth Circuit opinion also demonstrates little appreciation of market economics. Of course, no public school is willing to accept a student for only \$2,250. Additional students entail additional troubles and paperwork, and the voucher program offers no incentive for monopolistic public schools to expend extra effort to accept a voucher student from another school district. Furthermore, while a nonreligious, private school (which unlike the public school would actually have to compete with religious schools) might eventually accept students for \$2,250, no smart investor would invest in a voucher program facing the possibility of invalidation by courts like the Sixth Circuit. Before sinking funds into such a venture, investors will first wait to see that the voucher program has constitutional viability. As the Sixth Circuit's *Simmons-Harris* opinion demonstrates, investors in private education were wise to wait. Ironically, the court based its opinion in part on the lack of private, nonreligious schools competing for voucher students, a phenomenon probably induced by investor fear that the Sixth Circuit would rule exactly as it did.

this gives the religious schools \$5,000 more to spend on religious education. It is hard to believe that the Establishment Clause requires such a result.

Similarly, if tomorrow the public schools started accepting the vouchers, then the program would apparently become constitutional. This gives public school officials *de facto* power to decide whether the program is constitutional, a strange result indeed. Apparently, under the Sixth Circuit's reasoning, the program would also be constitutionally viable if the State of Ohio required public schools to accept the vouchers. Even then, however, there might still be a problem from the Sixth Circuit's perspective if no students elected to use their vouchers at public schools. In short, the Court of Appeals relied on an irrational basis in striking the program. The voucher program may raise some legitimate Establishment Clause issues, but whether the vouchers provide enough funding per pupil is not one of them. Similarly, the constitutionality of the program should not turn on the decision of private schools to accept the amount—even if it were a pittance that no school in its right mind would accept—offered by the State. Not surprisingly, no Supreme Court case has ever held that there is a minimum amount of funding a program must provide to withstand Establishment Clause scrutiny.

The Supreme Court also will certainly reject the Sixth Circuit's decision to consider the *extended effects*, rather than a *primary effect*, of the voucher program. *Agostini* and *Mitchell* show that *Lemon's* "primary effect" analysis is still the key to deciding these types of government-funding cases.²⁴³ The Sixth Circuit's analysis of this issue, however, is seriously flawed because of its emphasis on the disparate impact "suffered" by nonreligious schools that choose not to participate in the voucher program. This is not a primary effect of the voucher program,²⁴⁴ rather it is a result of the decisions made by public and nonreligious private schools. As the discussion above illustrates, public and most nonreligious private schools have elected not to compete for voucher students for several different reasons. Among these reasons are the following: (1) the public schools are not required by law to accept the voucher students and have no incentive to take on extra burdens involved in competing for them; (2) investors are unsure how courts will treat voucher programs and are reluctant

243. Similarly, one could fairly consider more than one effect to be "primary." This is not to say that courts should not look at the secondary effects of a government program.

244. As Judge Ryan noted in dissent, "There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program" *Simmons-Harris*, 234 F.2d at 970 (Ryan, J., concurring in part, dissenting in part).

to risk their money by investing in them; or (3) nonreligious schools have not yet perfected the art of penny-pinching and begging for donations and so are not in a financial position to accept the amount offered by the state. For these and other reasons unrelated to the essence of the voucher program or the way it distributes funds, non-religious schools are not competing for voucher students. Thus, this lack of competition cannot honestly be called a "primary effect" of the programs under any reasonable understanding of causation.

C. *Nyquist is Not Controlling*

Contrary to the holding of the Sixth Circuit in *Simmons-Harris*, the Supreme Court's opinion in *Nyquist* is no barrier to voucher programs, particularly in light of subsequent decisions clarifying the *Nyquist*'s holding and the Establishment Clause.²⁴⁵ Recall that *Nyquist* involved a New York program that provided tuition reimbursement and a tax deduction to parents who sent their children to private schools.²⁴⁶ The program did not cover parents who sent their children to public schools because they did not pay tuition. Indeed, this was a key aspect of the *Nyquist* holding. In distinguishing the New York program from the aid provided to students in *Allen*²⁴⁷ and *Everson*²⁴⁸ that the Court previously held to be constitutional, the Supreme Court noted, "*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools."²⁴⁹ This concern is not present in the Cleveland voucher program because vouchers are available to students who choose to attend public schools neighboring their own district, nonreligious private schools, or religious private schools.²⁵⁰ In short, there is complete neutrality.

245. See, e.g., *Mitchell*, 530 U.S. at 793; *Agostini*, 521 U.S. at 203. It's true that in *Agostini* the Court said that courts should not assume or imply that it overruled earlier precedents. *Agostini*, 521 U.S. at 237. But *Nyquist* is many respects not truly precedential with respect to voucher cases, as it did not entail the use of school vouchers. Furthermore, anyone can see that many of *Nyquist*'s premises and conclusions have been fatally undermined by decisions like *Zobrest*, *Agostini*, and *Mitchell*.

246. Comm. for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 764 (1973). *Nyquist* also involved grants for the maintenance and repair of private schools. *Id.*

247. *Allen*, 392 U.S. at 236 (holding that loaning textbooks to private schools does not violate the Establishment Clause).

248. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that state reimbursement of transportation expenses for private school students does not violate the Establishment Clause).

249. *Nyquist*, 413 U.S. at 782 n.38.

250. *Simmons-Harris*, 234 F.3d at 948, 949.

Moreover, to the extent that *Nyquist* would compel a different result, many aspects of *Nyquist* are no longer good law.²⁵¹ For example, the Court's decision was also based on the belief that some of the state money would ultimately fund religious education and speech.²⁵² The Court has made clear in *Witters*, *Zobrest*, *Rosenberger*, *Agostini*, and *Mitchell* that some public funding of religious speech does not violate the Establishment Clause if the funding is the result of private choices. For instance, in *Witters v. Washington Department of Services for the Blind*, the Supreme Court acknowledged that the government funds were going to be spent on religious education because Larry Witters was attending the Inland Empire School of the Bible to become a pastor, missionary, or youth director.²⁵³ Nevertheless, this did not create a problem under the *Lemon* test because the purpose was not to aid religion and the primary effect was not the favoring of religion.²⁵⁴

As to the primary effect, Justice Thurgood Marshall wrote for the Court: "It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution."²⁵⁵ Although the Court believed that a direct subsidy of a school violated the Establishment Clause, it held that the program at issue was not such a program because any funds that the school received were a result of Larry Witters' private choice, a choice the law empowered him to make.²⁵⁶ "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-non-public nature of the institution benefited.'"²⁵⁷

Similarly, in *Zobrest*, the state-supported translator would translate religious material for James Zobrest.²⁵⁸ Thus, the government funds

251. In his dissent in *Mueller v. Allen*, Justice Thurgood Marshall, joined by Justices William Brennan, Harry Blackmun, and John Paul Stevens, argued that the tax deduction at issue was an impermissible subsidization of religion, and that *Nyquist* compelled a different result. *Mueller*, 463 U.S. at 411 n.5 (Marshall, J., dissenting) (stating "*Nyquist* made clear, however, that absolutely no subsidization is permissible unless it is restricted to the purely secular functions of those schools."). This suggests, at least according to these four Justices, that *Mueller v. Allen* implicitly overruled *Nyquist*.

252. *Nyquist*, 413 U.S. at 783 (stating, "There has been no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.") (internal quotations omitted).

253. *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 488 (1986).

254. *Id.*

255. *Id.* at 486.

256. *Id.* at 487.

257. *Id.* at 488 (quoting *Nyquist*, 413 U.S. at 782-83).

258. *Zobrest*, 509 U.S. at 4, 12.

would ultimately support religious education. Nevertheless, this posed no problem under the Establishment Clause because the use of government funds for this sectarian purpose was the result of a private choice. Recall, in *Rosenberger*, the Court held that the use of government funds to pay for publishing a religious magazine at the University of Virginia did not violate the Establishment Clause.²⁵⁹ Again, because the religious message was attributable to private, rather than governmental, choices, the Establishment Clause was not implicated.

Nyquist is no longer good law because it fails to take into consideration the cleansing effect that general availability and private choice have on the use of government funds. *Nyquist* hardly, if at all, considered the effect that private choice has in insulating the government from religion. It did not explicitly assess the cleansing effect that private choice has on funds that make their way to sectarian schools. It made only two statements somewhat related to this argument: "the fact that aid is disbursed to parents rather than to the schools is one among many factors to be considered"²⁶⁰ and "[t]he absence of any element of coercion [of parents], however, is irrelevant to the questions arising under the Establishment Clause."²⁶¹ Because the *Nyquist* Court never had the benefit of this argument and never considered the understanding gained from cases such as *Witters*, *Zobrest*, *Rosenberger*, *Agostini*, and *Mitchell*, it is not the most applicable case for assessing the constitutionality of the Cleveland program and it is certainly not controlling.

Similar to the program in *Witters*, the Cleveland program relies on individuals to decide where to spend the money.²⁶² Some schools that will receive the vouchers are sectarian, just as those in *Witters* and *Zobrest*. And just as the schools attended by *Witters* and *Zobrest*, some of the education is religious in nature. Still, that fact does not make the program unconstitutional under the primary effect prong of *Lemon*. The primary effect of the program is the secular education of students; the fact that a small part of the private school curriculum also involves religious education makes no difference because, as in *Witters*, "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education."²⁶³

259. *Rosenberger*, 515 U.S. at 826, 845-46.

260. *Nyquist*, 413 U.S. at 781.

261. *Id.* at 786.

262. *Simmons-Harris*, 234 F.3d at 948.

263. *Witters*, 474 U.S. at 486. At least for Larry Witters, most of the money was going to pay for religious education. Because this was a result of a private decision by Mr. Witters, this fact did not bother the Supreme Court and similarly should not have bothered the Sixth Circuit with respect to the Cleveland program.

D. The Distinction Between Direct/Indirect Funding

During the era when the Supreme Court was predisposed to strike down any cooperative ventures of religion and government, one of the features it seized upon was the concept of "direct funding." Thus, if the government provided money directly to a religious school, the Court would frequently hold that it impermissibly favored that religion.²⁶⁴ In contrast, if the state provided aid to a third party who conferred the benefit on a religious institution, then the Court considered this extra step as a buffer between church and state, which insulated the process from an Establishment Clause challenge.²⁶⁵ But the Court has not been consistent even in this inconsistency, as *Nyquist* held unconstitutional a New York program that involved reimbursement and tax abatements for parents of private school students.²⁶⁶ From time to time, various Justices realized that the direct/indirect distinction often had little constitutional relevance.²⁶⁷ Whether an individual gives money obtained from the government directly to a church, or gives it to a third person who then conveys it to a church, makes no difference from the perspective of the financial benefit the church receives. The same is true of government tax exemptions: whether the government subsidizes the churches or simply declines to extract as much money from them as it does from the rest of society, the bottom line is the same. The church benefits financially under either scheme. Because any financial advantage the church obtains also profits its members (i.e., they do not have to pay as much to maintain the church as they

264. *Nyquist*, 413 U.S. at 780 (stating that "it is clear from our cases that direct aid in whatever form is invalid").

265. See, e.g., *Witters*, 474 U.S. at 486-87 ("[A] State may issue a paycheck to one of its employees who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary."); *Everson*, 330 U.S. at 1 (upholding the reimbursement of parents for the transportation of their children to private schools). As the Arizona Supreme Court has observed:

[U]nder both federal and state law, organizations unabashedly devoted to promoting religion—churches and other religious institutions—enjoy a number of direct economic tax benefits. These organizations escape income taxes, see A.R.S. § 43-1201(4), (11), and are not required to file returns, see A.R.S. § 43-1242. Taxpayers who donate to them can deduct the contributions from their federal and state income taxes. See 26 U.S.C. § 170; A.R.S. § 43-1042(A). Additionally, many of these organizations are exempt from property taxes, see Ariz. Const. art. IX, § 2(2), a direct government benefit which has long been held nonviolative of the Establishment Clause.

Kotterman v. Killian, 972 P.2d 606, 613 n.2 (Ariz. 1999). But see *Nyquist*, 413 U.S. at 765 (holding unconstitutional New York's program of tuition reimbursement and tax relief for parents of children attending private schools).

266. See *Nyquist*, 413 U.S. at 764-65, 780-81.

267. "A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger*, 515 U.S. at 859 (Thomas, J., concurring).

would if the government did not provide tax exemptions), tax abatements have the same effect as the government providing the church members with money, which they in turn convey to the church.²⁶⁸

Justices in favor of an expansive Establishment Clause have seized upon the fact that governmental aid to parents of religious school students ultimately results in governmental aid to religious schools, regardless of how many steps it takes to get there.²⁶⁹ Thus, in *Nyquist*, where New York provided tuition reimbursements to the parents of private school students, the Court elected to disregard the fact that parents received the tuition reimbursement (just as the parents in *Everson* received a transportation reimbursement) and held that this was still government aid provided to a religious institution.²⁷⁰ Similarly, in *Ball*, the Court observed,

The programs challenged here, which provide teachers in addition to the instructional equipment and materials, have a similar—and forbidden—effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.²⁷¹

Justices who read the Establishment Clause in line with the Framers' intent reason differently.²⁷² They believe that if so-called "indi-

268. Tax exemptions are actually more beneficial to the churches than government payments to third parties would be: (1) tax exemptions preclude a church from ever having to pay a penalty for non-payment of taxes, which might result if church members were late in making donations; (2) in light of the time value of money, tax exemptions result in greater value to churches than payments to church members, since the church has the financial benefit the moment the taxes are due, while the church member might not make his donation until much later; (3) because they need not rely on donations for the financial benefit of tax exemptions, church leaders don't have the worry of whether sufficient funds will be forthcoming, and thus have the benefit of the certainty that tax exemptions provide and the ability to make plans accordingly; and foremost (4) tax exemptions mean that the church will enjoy this financial benefit regardless of individual church members who, were they given the money by the government, might elect to spend it in other ways.

269. See, e.g., *Ball*, 473 U.S. at 395, *overruled in part by* *Agostini v. Felton*, 521 U.S. 203 (1997).

270. *Nyquist*, 413 U.S. at 781 (stating that "the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered").

271. *Ball*, 473 U.S. at 395, *overruled in part by* *Agostini v. Felton*, 521 U.S. 203 (1997).

272. The Framers thought it important to teach moral principles along with secular subjects. Hon. James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J. OF L. & PUB. POL'Y 189, 200 (2000) (quoting THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 470 (1871) (stating, "As Thomas Cooley noted in his authoritative treatise, Constitutional Limitations, the Framers considered it appropriate for government 'to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable assistants to the preservation of the public order.'"). The Framers' understanding of the Establishment Clause, like the rest of the First Amendment, should elicit a pause in judges before deciding cases that seek to prohibit longstanding practices in the name of the Constitution. As Justice Scalia has mentioned:

rect" aid is constitutional, then a less circuitous route (i.e., direct aid) is also permissible. In effect, they look beyond the form of the transaction to examine whether the substance results in impermissible fostering of religion. If the substance is permissible, whether the money comes through a direct route or takes a couple of detours along the way makes no difference with respect to the Constitution. Similarly, if the federal government enacts a law to fund only Methodist Church services, it makes no difference how many times the money changes hands before it arrives in church coffers. It still violates the Establishment Clause. As the *Mitchell* plurality noted, "Although some of our earlier cases, particularly *Ball*, did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent the 'subsidization' of religion."²⁷³

What the Court should have said originally, and what it eventually did say, is that government funding of a religious institution does not violate the Establishment Clause when the money flows to those institutions as a result of a third party's private choice to attend a religious school or to seek treatment at a religiously-affiliated hospital.²⁷⁴ Thus, for example, in *Witters v. Washington Dept. of Services for the Blind*, there was no Establishment Clause violation where the government paid the tuition of a student studying to be a pastor because the government made the funds available to *all* blind students regardless

Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff of which the Court's principles is to be formed. They are, in these uncertain areas, the very point of reference by which the legitimacy or illegitimacy of other practices are to be figured out.

Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting). This is sometimes called "mute behavior." Thus, "if for many generations it never dawns on anyone to use humiliation in the stocks as punishment, the absence of that form of punishment is a mute behavior," it might be that such punishment is universally recognized as unusual punishment. Similarly, if "until about 1970 no one imagined that the Constitution protected a right to abortion, that also is a mute behavior," which suggests that no such constitutional right exists. ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE* 152 (1994). It is related to, though different from, the practice of assessing the constitutionality of specific church-state interactions by analyzing whether the individual Framers viewed them as permissible. See Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that has gone of Itself*, 37 CASE. W. RES. L. REV. 674, 675-76 (1987) (noting that some Justices "gauge the constitutionality of church-state activities like nativity scenes, legislative chaplains, and public school prayer by appeals to 'tradition' (that is, whether the "Framers" countenanced a similar endeavor) . . .").

273. *Mitchell*, 530 U.S. at 828.

274. *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 489 (1986).

of their religion, and the student, rather than the government, chose the religious school.²⁷⁵ It makes no difference if the government gives the money directly to the school or if it gives the money to the student, knowing that the money will end up in the coffers of the religious school. Either method is proper under the Establishment Clause because, under both systems, the government is acting neutrally: it neither favors nor disfavors religion or students seeking a religious education.

In light of the utter meaninglessness of the direct/indirect funding distinction, it is not surprising that the *Mitchell* plurality specifically renounced the relevance of this distinction to the Establishment Clause analysis.²⁷⁶ Nevertheless, it appears that Justices Sandra Day O'Connor and Steven Breyer, along with the dissenters, have not come around to this understanding.²⁷⁷ Until at least one of them does, it appears that a majority of the Court will still hold that direct aid to religious schools is a cause for alarm and may signal a violation of the Establishment Clause.

Fortunately for the Cleveland program, it does not result in direct aid to religious schools. It entails the government issuing a check to the students' parents who endorse the check to the school. Notably, the funds can go to private schools or even public schools in neighboring districts, so long as those schools choose to accept the student.²⁷⁸ The required parental endorsement of the check demonstrates that the neutrality principle is completely operative here. As in *Agostini*, the "aid is provided to students at whatever school they choose to

275. *Id.* at 489 (holding that government payments to seminary student to reimburse him for tuition payments to sectarian college did not violate the Establishment Clause).

276. *Mitchell*, 530 U.S. at 829.

277. *Id.* at 841 (O'Connor, J., concurring in the judgment) (stating, "This characteristic of both programs makes them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing of a paycheck to an employee who, in turn, donates a portion of that check to a religious institution."); *Id.* at 888 n.8 (Souter, J. dissenting) (stating, "The plurality misreads our precedent in suggesting that we have abandoned directness of distribution as a relevant consideration.").

278. The Sixth Circuit got hung up on the fact that most parents participating in the voucher program elected to send their children to religious schools. That should not be surprising to anyone, as most private schools are affiliated with some religion. It does not mean, however, that permitting parents a choice in the education of their children is a subterfuge to fund only religious schools. Religious schools presently constitute a majority of private schools, but if the business community sees that government funds will consistently be available for private education, and that this will be a reliable source of capital, entrepreneurs will soon make investments in non-religious private schools. So long as Courts like the Sixth Circuit invalidate voucher programs, however, investors will be skittish about placing their valuable capital in a program that might be invalidated by the judiciary, thereby making the Sixth Circuit's observation that most private schools are religious schools a truism.

attend.”²⁷⁹ The government funds are disbursed to the religious schools only after going through the parents and only as a result of private parental choice.²⁸⁰ While it should make no difference whether the government issues the check to the schools or the parents, the extra step of requiring parental endorsement clearly demonstrates that the government is not favoring a particular religion; it is favoring education and respecting its citizen’s right to choose a quality education for their children. In light of Cleveland’s decision to adopt the approved form of indirect aid to private schools, the Sixth Circuit’s decision is even more baffling.

E. Pervasively Sectarian

Closely related to the “direct aid” consideration is the question of whether a religious school is “pervasively sectarian.” As the *Mitchell* plurality pointed out, the Supreme Court has sometimes expressed concern about the disbursement of government funds to institutions that are pervasively sectarian.²⁸¹ As the Court also mentioned, “pervasively sectarian” was often a code phrase meaning “Catholic,” and indeed, the Court has never defined the term with any precision, probably because everyone knew, with a wink and a nod, that the term meant “Roman Catholic.”²⁸²

Take for an example *Roemer v. Board of Public Works*.²⁸³ Because direct aid was involved, the plurality held that the funding would be

279. *Agostini*, 521 U.S. at 228.

280. *Simmons-Harris*, 234 F.3d at 948.

281. See, e.g., *Bowen*, 487 U.S. at 609-10; *Hunt*, 413 U.S. at 743; *Ball*, 473 U.S. at 385.

282. America has a long history of government discrimination against religious schools, particularly Roman Catholic schools. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Oregon prohibited parents from sending their children to Catholic grammar and high schools). From time to time, hatred for particular religions has also infected the Supreme Court. Former Democratic Senator and Ku Klux Klansman Hugo L. Black despised Catholics. HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 16 (1996) (stating, “Black sympathized with [the Klan’s] economic, nativist, and anti-Catholic beliefs . . .”). Indeed, Black and/or his law partners successfully represented a man who murdered a Catholic priest in cold blood after the priest has married his daughter to a Hispanic man. In doing so, he “urged the jury to show the world, by their verdict, that Birmingham’s Protestants would not allow their daughters to be proselytized by Catholics.” *Id.*, at 59-60, 262 n.83 (claiming that Black’s law partner actually defended Fr. Coyle’s murder); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER & CIVIL LIBERTIES IN MODERN AMERICA 81-82 (1989) (claiming that Black himself defended the murder). Another Democratic appointee, Justice James C. McReynolds, was an anti-Semite. BALL, *supra* at 89 (stating, “A virulent anti-Semite, McReynolds did not speak to Justice Louis D. Brandeis for three years after Brandeis, the first Jewish Supreme Court Justice, was appointed in 1916.”).

283. *Roemer*, 426 U.S. at 736 (plurality opinion). *Roemer* is a plurality opinion, written by Justice Blackmun, upholding Maryland’s practice of giving financial grants to religious colleges and universities. Although they agreed that the primary purpose and effect of the program

constitutional only if it did not go to institutions that were “perva-

posed no constitutional problems, Justices White and Rehnquist declined to fully join the plurality opinion because they believed the separate “excessive entanglement” analysis was unwarranted. *See id.* at 769 (White, J., concurring). As in most Establishment Clause cases from this period, there were four dissenters: Justices Brennan, Marshall, Stewart and Stevens. *Roemer* is also similar to most other Establishment Clause cases in that it involved a challenge to the funding of Roman Catholic institutions.

As the dissenters noted, *Roemer* is one of the few cases involving direct financial aid to religious schools. Although the state-provided funds could not be used directly for advancing religion, they were otherwise unrestricted. *Id.* at 740-41. By being used for other expenses of the school, these government funds permit the school to use their own money to advance their religious purposes. Regardless, five Justices agreed that this does not violate the Establishment Clause, suggesting that the same might be true for school vouchers.

The plurality purported to apply the *Lemon* test to the facts of the case. As usual, the Court had no problem finding a secular purpose: the support of private higher education. *Id.* at 754. As to the primary effect of the state aid, because direct financial assistance was being provided to sectarian colleges and universities, the Court held that the funding would be constitutional only if it did not go to institutions that were “pervasively sectarian.” *Id.* at 755 (citing *Hunt*, 413 U.S. at 743). The Court defined a “pervasively sectarian” school as one where “secular activities cannot be separated from sectarian ones.” *Id.* at 755. The district court held that the institutions were not pervasively sectarian, and the Court held that this finding was supported by the record. Specifically, the Court found the following issues to be relevant: (1) none of the institutions reported to the Catholic Church; (2) attendance at religious exercises was not required; (3) although religion courses were mandatory, non-religious subjects were also taught “without religious pressures;” (4) although some classes were begun with a prayer, there was no official policy requiring this; (5) except for the theology departments, most hiring decisions were not made on the basis of religion; and (6) although most of the students were Catholic, the schools did not discriminate against non-Catholics in their admission decisions. *Id.* at 755-57.

The finding that the schools were not pervasively sectarian was not the end of the matter, however. The Court also held that to satisfy the “primary effect” prong of *Lemon*, the record must show that the state money was used only to directly fund secular activities, although a permissible secondary effect might be the funding of religious activities. *Id.* at 760. In contrast to the Court’s previous practice of imputing a devious proclivity to ignore Establishment Clause limitations on funding, it assumed “that the colleges, and the Council, will exercise their delegated control over uses of the funds in compliance with the statutory, and therefore the constitutional, mandate. It is to be expected that they will give a wide berth to ‘specifically religious activity,’ and thus minimize the constitutional questions.” *Id.* Based on this assumption, the Court held that the government aid did not have the primary effect of advancing religion.

As to the “excessive entanglement” question, the plurality admitted that there “is no exact science in gauging the entanglement of church and state.” *Id.* at 766. It did, however, find four factors relevant: (1) the character of the schools (not-pervasively sectarian colleges, as opposed to elementary and secondary schools); (2) the form of the aid (no prescribed uses and thus little government oversight); (3) the process of annual funding (as opposed to more intrusive methods); and (4) the lack of political divisiveness engendered by the program. *Id.* at 762-65. Because the secular and sectarian activities of the colleges were easily separable, the plurality agreed that there was no proven danger of excessive entanglement. *Id.* at 764. Notably, Justices White and Rehnquist refused to join this aspect of the plurality opinion, because they believed there was no need to consider any entanglement question, at least not as a factor separate from the purpose and effect analysis. *Roemer*, 426 U.S. at 768 (White, J., concurring) (“It is unclear to me how the first and third parts of the *Lemon I* test are substantially different.”) (footnote omitted). “As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason particularly in light of the sparse language of the Establishment Clause to take the constitutional inquiry further.” *Id.*

sively sectarian.”²⁸⁴ The plurality considered a “pervasively sectarian” school as one where “secular activities cannot be separated from sectarian ones”²⁸⁵ In agreeing with the district court that the institutions at issue were not pervasively sectarian, the plurality considered several relevant issues: (1) none of the institutions reported to the Catholic Church;²⁸⁶ (2) attendance at religious exercises was not required; (3) although religion courses were mandatory, nonreligious subjects were also taught “without religious pressures;” (4) although some classes began with a prayer, there was no official policy requiring this; (5) except for the theology departments, most hiring decisions were not made on the basis of religion; and (6) although most of the students were Catholic, the schools did not discriminate against non-Catholics in their admission decisions.²⁸⁷ Hoping to ensure that no Catholic institutions received any government money—despite the fact that Catholics were also taxpayers and, therefore, entitled to the same benefits of other citizens—the Court has sometimes suggested that even indirect aid would violate the Establishment Clause if provided to pervasively sectarian institutions.²⁸⁸

Although the pervasively sectarian nature of the schools at issue in *Simmons-Harris* did not—on the surface, at least—play a large part in the Sixth Circuit’s decision, the pervasively sectarian nature of many private schools could present a problem for voucher programs like that in Cleveland. Undoubtedly, most schools involved in that program would be considered pervasively sectarian under the indicia mentioned in *Roemer*. For many of the schools, the secular and religious teachings are not easily separated in that the instructors always attempt to instill moral values in the children, whether the venue is a science class or physical education.²⁸⁹ Not surprisingly, most also re-

284. *Roemer*, 426 U.S. at 755 (citing *Hunt*, 413 U.S. at 743).

285. *Id.*

286. It is not clear what the Court meant by this. These institutions might not fill out a written report every year to the Vatican, but all Catholic institutions of higher education come under the jurisdiction of the local Bishop, and thus in some sense “report” to him. See, e.g., *Lemon*, 403 U.S. at 617 (stating, “The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative . . .”).

287. *Roemer*, 426 U.S. at 755-57.

288. “This ‘indirect subsidy’ effect only evokes Establishment Clause concerns when the public funds flow ‘to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission’” *Ball*, 473 U.S. at 394 n.12 (1985), *overruled in part by* *Agostini v. Felton*, 521 U.S. 203 (1997).

289. Perhaps the public schools should attempt to emulate private schools in this respect, at least so far as the Establishment Clause permits. As Roscoe Pound noted: “For there is a strong social interest in the moral and social life of the individual.” ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 132 (1921). But, “teaching character is a difficult task.” WILLIAM J. BENNETT, *OUR CHILDREN AND OUR SCHOOLS: IMPROVING AMERICA’S SCHOOLS AND AFFIRMING THE*

quire prayer and attendance at religious programs²⁹⁰ and make some hiring decisions on the basis of religion. Furthermore, at least with the Catholic schools, the instructors answer to the pastor who, in turn, answers to his bishop.

Depriving these schools of their religious character would also rob them of their distinct identity. Considering that the academic success of religious schools might be due in large part to their religious nature, this would also deprive these schools of their secular value. Thus, becoming "pervasively secular" is not an option for them and, indeed, should not be required.²⁹¹ Yet if the Court elects to readopt its policy of discriminating against sectarian schools, children who otherwise would benefit from the discipline and structure of private schools will continue to suffer educational deprivation.²⁹²

COMMON CULTURE 19 (1988). At present, parents get no help in teaching ethics from public schools, which are presently forced by the Establishment Clause jurisprudence to ignore the ethical dimensions of their students.

290. See, e.g., *Zobrest*, 509 U.S. at 18 (Blackmun, J., dissenting). Justice Blackmun's dissent describes the religious nature of the Catholic high school James Zobrest was attending.

James Zobrest requested the State to supply him with a sign-language interpreter at Salpointe High School, a private Roman Catholic school operated by the Carmelite Order of the Catholic Church. Salpointe is a "pervasively religious" institution where the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined. Salpointe's overriding "objective" is to instill a sense of Christian values. Its distinguishing purpose is the inculcation in its students of the faith and morals of the Roman Catholic Church. Religion is a required subject at Salpointe, and Catholic students are "strongly encouraged" to attend daily Mass each morning. Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular. They are encouraged to do so by assisting students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.

Id.(citations and internal quotations omitted).

291. Unfortunately, there is always the danger that schools will abandon some of their religiosity to conform to a liberal society that does not think much of religion, except as a tool for its political agendas. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 282 (1996) (stating, "Clergy and church bureaucrats are members of the intellectual class and look to that class for approval, an approval they cannot win through their merits as religionists, but only through their political attitudes and political usefulness.").

292. It is true that the government does not affirmatively prohibit any child from attending religious schools. But taking their parents tax dollars (thereby inhibiting or depriving them of the ability to purchase education on their own) and refusing to provide any of the money to religious schools, achieves the same result as an overt prohibition, at least for non affluent families. Chief Justice Marshall was certainly correct when he noted that "the power to tax is the power to destroy." By taxing families to provide educational "services," without giving the parents an option to decide which services are in their children's best interests, government has destroyed the freedom of choice that parents would otherwise have enjoyed.

VI. CONCLUSION

The United States Supreme Court's understanding of the Religion Clauses has recently brought about a much-needed Renaissance in First Amendment jurisprudence. Now, at least a plurality of the present Court recognizes that "a *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future."²⁹³ In both the present and the future, religious institutions can help government achieve many of its noble goals, particularly the education of its citizenry, so long as primitive prejudices against religion are not allowed to interfere with the Court's interpretation of the Establishment Clause. Under the Court's new understanding of the Establishment Clause, there is nothing to prevent government from employing religious schools to educate America's youth. This is especially so when accomplished through the use of vouchers, because vouchers empower parents to decide for themselves which school best provides for their child's mental and moral development. Should they decide that a religious school best comports with their child's education and their tax dollars could best be spent in that venue, the Establishment Clause does not stand in their way.

As demonstrated above, not every Justice on the Court has been enamored with the evolving Establishment Clause jurisprudence, particularly as it was enunciated in the *Mitchell* plurality opinion. Most notably, Justice O'Connor takes a more narrow view of what that Clause permits. But even under Justice O'Connor's understanding of the Establishment Clause, voucher programs like the one in *Simmons-Harris* can meet constitutional standards, as long as the programs do not intentionally discriminate against students who wish to attend nonreligious schools or those who want to attend a school of a particular faith. This is such an elementary proposition that no program has ignored it.

Because it is not clear just how much emphasis will be placed on the distinction between the direct/indirect funding of religious schools, to be safe, school funding programs should put as much distance between the government and the schools as possible. The safest alternative might be a system whereby school funds are transferred to a private accrediting agency (perhaps one that evaluates schools solely on the basis of test scores or other objective, secular criteria) that, in turn, issues education vouchers or funds to parents who, in turn, pay tuition to the schools. Of course, this system is undesirable insofar as it creates a new bureaucracy (which will require the expenditure of

293. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 83 (1921).

more funds) and has a greater potential for fraud. Nevertheless, these additional steps between the government and sectarian schools seem to ease the minds of jurists focused on formalities.

In light of the present makeup of the Supreme Court, some programs whereby the government pays for education at sectarian schools certainly will be capable of passing muster under the Establishment Clause. Unfortunately, it may take a little tinkering to ascertain just how far Justice O'Connor will go in freeing governments from the Court's outdated and oppressive Establishment Clause jurisprudence. Once the reconstituted boundaries of the emerging Establishment Clause jurisprudence are better understood, compliance should not be particularly onerous, even for pervasively sectarian schools. Despite the present elements of uncertainty, the Cleveland voucher program easily should pass constitutional muster.

For conservatives who value the religious identity and mission of their churches, the most important question with respect to school aid, however, does not concern the Establishment Clause at all. Those who still hope for smaller federal and state governments may have much to fear from government funding of religious schools. As the Supreme Court has noted, "[M]odern governmental programs have self-perpetuating and self-expanding propensities."²⁹⁴ "[W]e know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases."²⁹⁵ With the advent of government funding of religious schools, there is a danger that churches might become the next powerful special interest group to come begging for government handouts. And once on the government gravy train, it is hard to get off. It is true that the present public school monopoly is hardly efficient, so introducing a little free market competition into the equation will necessarily yield benefits for taxpayers and pupils,²⁹⁶ but there is a legitimate concern that religious and secular institutions will form an unholy alliance to extract even more money from unsuspecting tax-

294. *Lemon*, 403 U.S. at 624.

295. *Nyquist*, 413 U.S. at 797.

296. "[P]rivate schools frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition." *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999). It's no surprise to anyone that, because parents in wealthy communities have the ability to choose where to send their children to school (ie., they have the capital to send them to a private school if they are unsatisfied with the public school), excellent "public schools tend to be concentrated in the wealthier suburbs of the larger cities, where parental control remains very real." MILTON AND ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 158 (1980).

payers. Furthermore, there is a danger that the private schools will dilute their religious message or sacrifice their religious identities to compete for a broader range of students.

Despite these prudential concerns, it is beyond reasonable debate that voucher programs, such as the one employed in Cleveland, do not violate the Establishment Clause because they offer their aid neutrally among religions. Accordingly, the Sixth Circuit's *Simmons-Harris* decision is in for a rough ride before the Supreme Court. States must be permitted to experiment with vouchers in an attempt to make America a better-educated nation. The Supreme Court should not allow an anachronistic understanding of the Establishment Clause to stand in the way. In *Wisconsin v. Yoder*, the Court said that the state has "a high responsibility for [the] education of its citizens"²⁹⁷ In *Simmons-Harris*, the Supreme Court has the opportunity to demonstrate whether it truly believes what it said in *Yoder*, or whether bigoted notions of "separation" will continue to foil attempts at excellence in education.

297. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).